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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 28—ORIGINAL.

28.10

STATE OF NEW JERSEY,
Plaintiff,

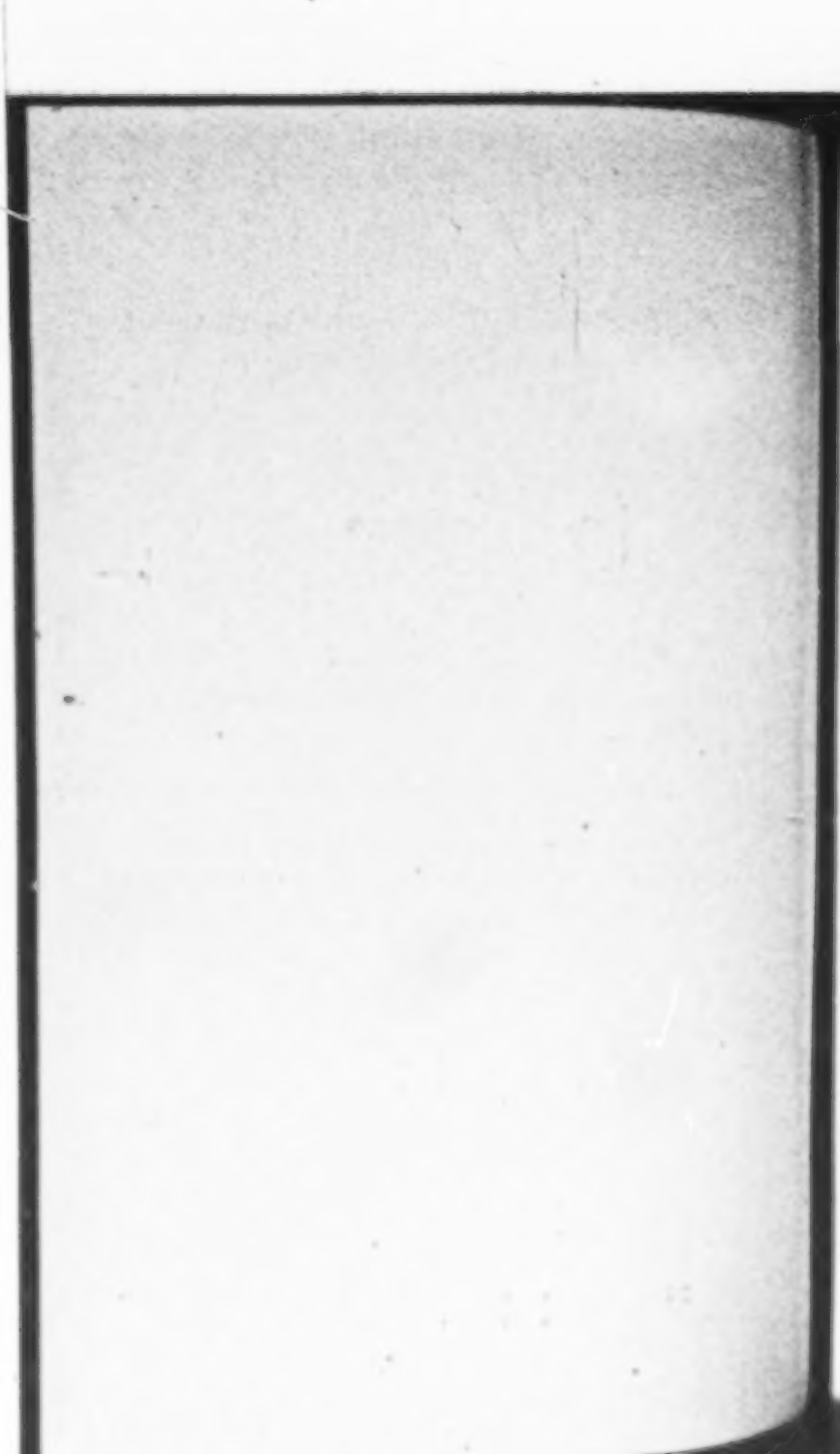
vs.

THE CITY OF NEW YORK,
Defendant.

MOTION FOR LEAVE TO FILE ANSWER AND APPLICATION FOR FURTHER RELIEF AND SUPPORTING BRIEF.

ARTHUR J. W. HILLY,
Corporation Counsel,
Solicitor for Defendant.

Fanfold Press, Inc., 49 Thomas St., New York, U. S. A.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 13—Original.

STATE OF NEW JERSEY,
Plaintiff,

vs.

THE CITY OF NEW YORK,
Defendant.

Notice.

To Hon. William A. Stevens and Hon. Duane E. Minard,
Solicitors for Plaintiff-Petitioner:

Sirs:

Please be advised that on Monday, May 8, 1933, the defendant will apply to the Court for leave to file the annexed answer, application for further relief and supporting brief.

Yours, etc.,

ARTHUR J. W. HILLY,
Corporation Counsel,
Solicitor for Defendant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 13—Original.

STATE OF NEW JERSEY,
Plaintiff,

vs.

THE CITY OF NEW YORK,
Defendant.

Motion for Leave to File Answer and for Further Relief.

COMES NOW The City of New York, by its Corporation Counsel, and asks leave of the Court to file the annexed answer and application for further relief.

ARTHUR J. W. HILLY,
Corporation Counsel,
Solicitor for Defendant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 13—Original.

STATE OF NEW JERSEY,
Plaintiff,

vs.

THE CITY OF NEW YORK,
Defendant.

Answer to Petition and Prayer for Further Relief.

COMES NOW the defendant, and respectfully shows:

1. At page 15 of the report of the Special Master upon the re-reference herein, the Special Master said:

> "The estimates made by the witnesses do not take into consideration the time that may be lost on account of strikes or unforeseen conditions that may arise beyond the control of the City or the contractors."

2. It was entirely unforeseen at any time during the pendency of this cause before the Court and its Special Master that financial conditions affecting the entire United States of America would change so radically and unfortunately as they have changed. This is particularly true with regard to municipal securities.

3. In The City of New York the funds necessary for the acquisition of sites for and the construction of garbage destructors or incinerators may only be raised through the issue and sale of corporate stock. The provisions of the statutes in that regard are contained in Section 169 of the Greater New York Charter (New York Laws of 1930, Chapter 565).

4. In the defendant City, municipal improvements, such as garbage destructors, must be, and always have been, financed through the issuance and sale of long term corporate stock bonds.

5. The most recent long-term bond sale The City of New York, because of bond market conditions, has been able to hold occurred on March 1, 1931, before the rendition of the decree of this court upon the report of the Special Master herein, and before its final decree herein of December 7, 1931, adverted to in paragraph "7" of the plaintiff's petition.

6. From approximately December 1, 1931, the investment market has been in such bad condition, that the prices offered for bonds of the defendant City have fallen so low as to bar absolutely any long term bond sale, even where the bonds or corporate stock of the defendant City bore interest at the rate of 6% which is the maximum legal rate of interest in the State of New York.

7. The defendant City, prior to December 1, 1931, had outstanding short term corporate stock notes to the

amount of $76,700,000 issued by it to meet contract payments and to pay awards for real property acquired by the City in condemnation proceedings.

8. The corporate stock notes mentioned in the preceding paragraph were issued pursuant to the authority of Section 189 of the Greater New York Charter (New York Laws of 1920, Chapter 713) in anticipation of the sale of long term corporate stock, duly authorized at the time of the issuance of such notes.

9. From about midsummer in the year 1931 to the close of that year the defendant City could only obtain funds for the purposes for which it was required to finance its projects and operations through the sale of the short-term corporate stock notes authorized by Section 189 of the Greater New York Charter and contemplating payment out of the subsequent sale of long-term corporate stock bonds.

10. On or about December 23, 1931, the Comptroller of the defendant City, being, like the other members of the Board of Estimate and Apportionment, gravely concerned as to the inability of the defendant City to raise funds in the bond market, notwithstanding the true excellence of its fundamental financial condition, sought to engage the cooperation and assistance of leading financial houses with a view to enabling the defendant City to market its securities and so provide the funds imperatively needed for past incurred contract and land acquisition liabilities.

11. The conferences of the defendant's Comptroller with the representatives of the aforementioned financial and banking houses brought no successful result. There was, however, sponsored as a result thereof, the adoption by the Legislature of the State of New York of a new section, to wit, Section 189-a of the Greater New York Charter (New York Laws of 1932, Chapter 4) under which the defendant's Comptroller was authorized to issue notes to be known as special corporate stock notes not to exceed at any one time the amount of $200,000,000, which amount would, and did, however, include all outstanding short-term corporate stock notes of the defendant and was to be the utter limitation of the borrowing power of the defendant City, except upon long-term securities.

12. The aforementioned sum of $76,700,000, which was payable within a year from date of issue, was included in the $200,000,000 referred to in the preceding paragraph hereof and the amount of special corporate stock notes made available for use on January 20, 1932, by the aforesaid Section 189a of the Greater New York Charter, was the sum of $123,300,000. Against this limit of $123,300,000 there were, on January 1, 1932, outstanding liabilities for the following:

(a) Liability upon contracts registered in the year 1931 and prior thereto....	$136,745,000
(b) Liability for land acquired by condemnation, title to which had previously legally vested in The City of New York, estimated at.....	52,500,000

13. Nothing will cure, or be capable of curing, the defendant City's inability to engage in projects necessitating the expenditure of capital funds except an ability to negotiate its long term obligations; and this it will continue to be unable to do until the financial condition of the country permits investors to purchase long term obligations. In this connection the attention of the court is invited to the fact that by Section 182 of the Greater New York Charter (New York Laws of 1915, Chapter 308) the defendant City is prohibited from negotiating any of its securities at less than par.

14. In the month of September 1931, and long prior to the entry of the final decree herein, the proper authorities of the defendant City had been engaged in, and had completed the work of preparing plans and specifications for four incinerators and the proposed contracts for each of the said incinerators.

15. These proposed contracts, plans and specifications were, on September 22, 1931, duly presented, as required by the defendant's Charter, to its Board of Estimate and Apportionment for the approval required by law, preliminary to advertising for bids thereon and duly came before its Committee of the Whole on December 15, 1931, by which they were restored to the formal public calendar of the City's Board of Estimate and Apportionment for December 18, 1931.

16. When the matter of the said four contracts came on for public hearing before the defendant's Board of Esti-

mate and Apportionment on December 18, 1931, objectors appeared and in regular course the matter was laid over to January 15, 1932.

17. By January 15, 1932, when the matter of the said four contracts again came on for public hearing before the Board of Estimate and Apportionment of the defendant City, the financial situation hereinbefore mentioned had become so extremely acute that for the purpose of meeting its accrued contract and land purchase obligations, the defendant City found it necessary to advocate the enactment by the State Legislature of the above mentioned Section 189-a of the Greater New York Charter.

18. On January 22, 1932, when the matter of the aforesaid contracts again came on for public hearing before the defendant's Board of Estimate and Apportionment, the general financial situation was even worse than it had theretofore been thought to be, and, it was impossible for the defendant City to enter into new obligations involving the expenditure of capital funds. So dire, indeed, was the situation, that the defendant City has been obliged to discontinue very many public improvements on which construction had been commenced. Amongst the improvements which the City has been so compelled to discontinue are:

A. The construction of the so-called Tri-Borough Bridge to connect the Boroughs of Manhattan, Bronx and Queens, spanning the East and Harlem Rivers. On this project, there had been, theretofore, actually expended by the City of New York a total of $4,000,000. The project was ultimately to cost at completion, a total of $40,000,000.

B. The Mid-Manhattan Tunnel Project, to connect the west side of Manhattan Island with New Jersey, and the east side of Manhattan with the Borough of Queens, making possible one continuous passage for vehicles from the State of New Jersey under the island of Manhattan to Long Island. The City had actually expended or assumed a total of $2,000,000 on preliminary work on this project and up to the time it was abandoned, no definite estimate had been made of its ultimate cost, but it may be conservatively stated to exceed that of the Tri-Borough Bridge.

C. During the 8 or 10 years prior to 1933, the City of New York expended annually from $25,000,000 to $30,000,000 for the erection and equipping of new school buildings and additions to existing school buildings. Commencing in the Spring of 1932, the City of New York entirely suspended the construction of new school buildings and additions to existing buildings.

D. For several years the City of New York has had under consideration the provision of additional sources of water supply from the watershed of the Delaware River, and, in fact, was obliged to litigate the question as to its right to such waters in this Court. The plan contemplating the utilizing of the Delaware waters has been estimated to require an expenditure of $250,000,000 to $300,000,000, and is urgently needed so as to prevent an imminent shortage of water in the City of New York. All work on this project has been suspended and, to date, all authorizations for funds therefor have been either rescinded or refused.

E. Commencing January, 1926, the City of New York laid out comprehensive plans for the relief of congestion in its then existing rapid transit systems and projected what has been called the Independent Subway System. Despite the necessity for completing this Independent System, the City of New York, commencing in 1932, rescinded authorizations then outstanding, and has refused to consider any further authorizations for expenditures of funds to extend said Independent System beyond the so-called Eighth Avenue Line, and the links thereof then completed or partially completed.

F. The advancement of designs or the progress of construction on various types of buildings required for municipal purposes other than those above discussed, such as hospitals and office buildings, has been entirely stopped. The City of New York has on a plot in the Borough of Manhattan, bounded by Centre, Leonard, Worth and Lafayette Streets, a foundation erected for an office building for the Departments of Health, Hospitals and Sanitation, work upon which has been entirely discontinued.

19. It is true as stated in the report of the Special Master upon re-reference, that appropriations have already been provided for incinerators in authorized localities; but appropriations of this nature by the Board of Estimate and Apportionment of The City of New York are merely authorizations to the Comptroller to sell corporate stock for the purpose of raising the moneys appropriated.

20. Resolutions of appropriation merely indicate the purposes for which public funds, when raised, may be spent. They do not indicate that the funds appropriated are in the Treasury of the defendant City.

21. Despite the impossible financial situation outlined above, with no improvement or prospect of improvement for the sale of long term bonds of the City of New York, the defendant's Board of Estimate and Apportionment, in the month of November, 1932, authorized the Sanitary Commission of The City of New York to award contracts for the construction of two incinerating plants, each with a capacity of 750 tons per day of 24 hours, to be located as follows:

Contract A—215th-216th Streets, 9th to 10th Avenue, Manhattan;

Contract B—Zerega Avenue, between Lafayette Avenue and Hermany Avenue, Bronx;

the aggregate cost being $1,409,535, exclusive of plumbing and heating.

22. The aforesaid contracts were duly registered pursuant to Section 149 of the Greater New York Charter, by the Comptroller of The City of New York, and constitute legal obligations of the City.

23. The two above mentioned incinerators will be completed on April 1st, 1934, barring unforeseen contingencies.

24. When completed, these plants operating as it is intended that they shall operate, for twenty-four hours per day on six days in the week, instead of through the sixteen hours per day, which was the basis of the opinion of the experts, upon which the Special Master framed the

recommendations contained in his report on re-reference, will incinerate a daily average of 950 tons of garbage. This will reduce the amount theretofore disposed of at sea from a maximum of 1,200 tons per day to not more than 250 tons per day.

25. At no time during recent years has the minimum daily quantity of garbage disposed of at sea been less than 800 tons per day. It is confidently expected that from and after the date of the completion of the said two garbage incinerators, it will no longer be necessary for the defendant City to dump any garbage at sea.

Wherefore, the defendant, The City of New York, prays that the decree of this Court filed herein on the 7th day of December, 1931, be modified by changing from June 1st, 1933, to April 1st, 1934, the date specified in paragraph numbered "I" of the said decree as that upon which its employees and agents and all persons acting under its authority will be enjoined from dumping any garbage or refuse into the ocean or waters of the United States off the coast of the State of New Jersey.

And the defendant will ever pray.

Dated, New York, May 8, 1933.

Arthur J. W. Healy,
Corporation Counsel,
Solicitor for Defendant, The City
of New York.

DEFENDANT'S BRIEF IN SUPPORT OF THE FOREGOING APPLICATION.

The fact that the decree herein of December 7, 1931, was entered upon consent is, of itself, convincing evidence of the good faith of the defendant City.

From the facts stated in the petition it is evident that the "unforeseen conditions," to which the Special Master adverted at page 15 of his report upon the re-reference herein, did not contemplate the financial distress which the country at large, very shortly thereafter, has been compelled to endure.

The City of New York, like every other municipality, is restricted as to the manner in which it may raise moneys for public purposes and is also restricted as to the amount of indebtedness which it may incur. Under Article 12, Section 1, of the Constitution of the State of New York it is the duty of the Legislature to restrict the power of the cities of the State to tax, to assess, to borrow money, to contract debts, and to loan their credit.

This power has been duly exercised by the State Legislature, and finds partial expression in Sections 169, 189 and 189a of the Greater New York Charter, to which reference has been made in the foregoing application.

The City of New York has by no means reached the limit of the long-term indebtedness which it may, under the Constitution and Laws of the State of New York, incur. Its debt margin upon long-term obligations exceeds by at least $400,000,000 any existing obligations.

Its inability to borrow money for capital improvements, such as garbage incinerators, is due not to any lack of

capacity on its part to meet its obligations, when and as they accrue, but to the inability of the citizens to lend their moneys for such projects during the present time.

This condition is not peculiar to The City of New York but exists to an intolerable extent in all of the greater cities of the Nation. In fact, despite their wealth, some cities have been unable to meet past obligations.

It is not to be denied that the defendant City has not completed and will not be able to complete on June 1, 1933, the date when this Court's final decree as at present written becomes effective, the garbage incinerating plants concerning which testimony was offered before the Special Master and to which he adverted in his reports.

If the City could obtain, or could have obtained, the moneys necessary for the erection of the garbage disposal plants referred to in the petition herein and in the reports of the Special Master, it would unequivocally have so done.

In The City of New York, as in other great cities of the country, taxes upon real property, which are the principal bases for the raising of moneys, have, in stupendous figures, not been paid,—to such an extent, indeed, that salaries of municipal officers and employees and State officers, paid out of City funds, have been drastically reduced.

Without such curtailment of the eminently legitimate and necessary cost of conducting the municipal government, it would have been unable, efficiently, to continue, with the result that police and fire protection would be dreadfully diminished, the educational establishment tremendously reduced, and such matters as the care of the sick and relief of the poor entirely discontinued.

The City of New York, like every other municipal corporation, does not exist for profit and has no power to

accumulate funds, during periods of prosperity, which can be applied to necessities in periods of depression. It has only the closely supervised and restricted power of taxation and the power to issue its bonds for the purpose of financing capital improvements.

In the existing state of the securities market the defendant City can find no buyers for its long-term obligations, and, finding no buyers, is unable to convert the special corporate stock notes issued under the authority of Section 169a of the Greater New York Charter, and being so thwarted, cannot issue further short-term corporate stock notes even if it could find buyers therefor.

The situation in which the defendant City finds itself is not of its own creation or of its own neglect. It is due to a financial condition entirely beyond its control and in the creation of which it had no part.

The most unusual financial situation which began, so far as the defendant City is concerned, toward the close of the year 1931, will not have passed by June 1, 1933. The question of how long that situation will continue, not only for the defendant City but for every other municipality in the United States, cannot presently be answered.

The defendant City has been doing and will continue to do all that it is possible for it to do under the present adverse financial conditions, toward complying with the prescriptions of this Court's final decree of December 7, 1931.

It is earnestly desirous of giving its full obedience to the said final decree but for the reasons set forth in the foregoing answer and application, and herein, is unable so to do and is thus compelled to seek the favor of the Court.

In Conclusion.

The defendant City urgently requests that the final decree herein be modified by extending the date upon which it shall become operative from June 1, 1933 to April 1, 1934.

Respectfully submitted,

ARTHUR J. W. HILLY,
Corporation Counsel,
Solicitor for Defendant.

FILE COPY

APR 30

CHARLES ELMORE

BEACH POLLUTION CASE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

10

No. 1 Original.

STATE OF NEW JERSEY,

Plaintiff,

vs.

THE CITY OF NEW YORK,

Defendant.

PLAINTIFF'S BRIEF IN SUPPORT OF THE SPECIAL MASTER'S REPORT.

WILLIAM A. STEVENS,
Attorney General,

DUANE E. MINARD,
Assistant Attorney General,
Solicitors for Plaintiff.

April 30, 1931.

Arthur W. Cross, Law Printer, [illegible] Lafayette Street, Trenton, N. J.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 17, Original.

STATE OF NEW JERSEY,
Plaintiff,

vs.

THE CITY OF NEW YORK,
Defendant.

PLAINTIFF'S BRIEF IN SUPPORT OF THE SPECIAL MASTER'S REPORT.

I.

Statement of the Case.

This is an original action brought by the Attorney General in the name of the plaintiff pursuant to a resolution of the Legislature (Exhibit 68).

The complaint alleges that the dumping of garbage and refuse by defendant in the navigable waters of the United States off the coast of plaintiff causes great damage to plaintiff and its citizens in their health, welfare and property, and creates a public nuisance in its waters and on its shores, which it asks this court to restrain. The allegations of the complaint are fully set forth in the Special Master's report (pp. 3-6).

Defendant's original answer was a general denial, but after the testimony was concluded and February 4, 1931 had been fixed for argument before the Special Master, it applied, on February 2, 1931, for, and on

February 24, 1931, obtained leave to file an amended answer.

The amended answer admitted the dumping of garbage and refuse at sea but denied that the places of dumping were within the navigable waters of the United States. It claimed the right to do this under permits issued by the Supervisor of the Harbor of New York under authority of Title 33, United States Code, sections 441, 443, 449, and 451, and alleged that this court had no authority to enjoin such dumping, because it was done on the "high seas."

It alleged, also, that large quantities of garbage, condemned food stuffs, and various materials were dumped both inside and outside New York harbor and in the sea lanes at various points south of New York City by passing steamships, by private contractors under similar permits, and by the United States Navy; that insufficiently treated and unsanitary sewage from the cities of Long Branch and Asbury Park was discharged into the ocean near the beaches of those cities; that it is impossible to determine whether the garbage or offensive material in substantial quantities dumped by defendant is deposited in the waters and on the beaches of plaintiff, or in greater quantities than that deposited at sea by the other agencies mentioned; and that, therefore, the damages suffered by plaintiff and its citizens is not chargeable to defendant.

The defenses and allegations of the amended answer are fully set forth in the Special Master's report (pp. 7-9).

Chronology.

The complaint was filed May 13, 1929; Answer filed June 10, 1929; Reply filed October 7, 1929; Order of Reference entered October 14, 1929; hearings held De-

cember 11-13, 1929, January 15-17, 22-24, March 24, April 8, and December 5, 1930; application made February 2, 1931, for leave to file an amended answer; briefs filed and argument heard before the Special Master February 4, 1931; application granted and amended answer filed February 24, 1931; Special Master's report filed March 20, 1931.

Exceptions.

Plaintiff has filed no exceptions to the Special Master's report, but defendant has filed 94 exceptions thereto, arranged under six general headings, which will be followed in this brief.

Record.

The parties have stipulated with permission of the court, that the record of the testimony shall consist of a printed "Abstract of Testimony" which plaintiff prepared for the use of the Special Master, supplemented by that taken at a subsequent hearing held December 5, 1930, and that either party may refer, in briefs or on argument, to the exhibits on file, without printing the same as a part of the record, subject to objections thereto, and to print in, or as an appendix to, its brief any part or all of any of such exhibits.

II.

Jurisdiction.

Jurisdiction is conferred by Article III, Section 2 of the Constitution of the United States, and Section 341, Title 28, U. S. C. A. (p. 171), and has been frequently sustained. *Missouri* v. *Illinois*, 180 U. S. 208; *New York* v. *New Jersey*, 256 U. S. 296; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230; *Wisconsin v. City of Duluth and the Northern Pacific Railroad Co.*, 96 U. S. 379.

III.

Summary of the Argument.

(1) This Court has jurisdiction to grant the relief demanded in the bill of complaint because, among other things, (a) the suit is one to protect quasi-sovereign rights of the plaintiff; (b) because the defendant is before the court; and (c) the property affected is within the United States.

(2) Garbage and refuse in large quantities dumped by the defendant in the Atlantic Ocean more than a marine league from the shores of the waters of the plaintiff is driven and carried by the winds and waters to and upon the beaches of the plaintiff and its adjacent waters, thus creating a public nuisance, to the great injury of the plaintiff's rights and property.

(3) Compliance by the defendant with the provisions of the Act of Congress of June 29, 1888 (29 Stat. 209) as amended, and the permits to dump garbage in the Atlantic Ocean at a distance in excess of one marine league from the shores of New Jersey issued by the Supervisor of the Harbor of New York in accordance with said Act, do not relieve the defendant from the effect of the public nuisance resulting from and created by said dumping.

(4) Such garbage and refuse as reaches the plaintiff's shores from the dumpings by coastwise and other vessels and from other sources is negligible in comparison with that dumped by defendant and reaching plaintiff's shores and constitutes no defense to plaintiff's complaint.

(5) Particular exceptions to the Special Master's report and to his failure to find facts and make conclusions of law as requested by defendant and in support of its contention that on all of the evidence, a case for

equitable relief in favor of the plaintiff, was not made out.

(6) Recommendations for decree.

IV.

ARGUMENT.

(1)

This Court has jurisdiction to grant the relief demanded in the bill of complaint because, among other things, (a) the suit is one to protect quasi sovereign rights of the plaintiff; (b) because the defendant is before the Court; and (c) the property affected is within the United States.

Under this heading defendant groups its first eleven exceptions, which challenge the Master's findings of a justiciable controversy and of jurisdiction.

(a)

The suit is one to protect quasi-sovereign rights of the plaintiff.

A justiciable controversy is succintly defined by Mr. Justice Brewer as follows:

> "Clearly this controversy is one of a justiciable nature: The right to the flow of a stream is one recognized at common law, for a trespass on which a cause of action existed." *Kansas v. Colorado*, 206 U. S. 46, 85.

The principal issue raised by the pleadings is whether the acts complained of create a public nuisance on the lands and in waters of the plaintiff. At common law a cause of action existed for damages resulting from either a public or private nuisance. *Chitty's Pleading*, 136, 142; 3 *Bl. Com.* 216, and either was restrainable in the Court of Chancery. 2 *Daniell's Chy. Pl. & Pr.*,

1739-40; 2 *Story's Eq. Jurisp.* Sec. 1248. A controversy of a justiciable nature is presented. (Cases cited under "Jurisdiction," Part II of this brief).

The complaint alleges, *inter alia*:

> "1. The plaintiff is a State of the Union * * * and exercises through its Legislature the powers and duties of sovereignty within its territorial limits under and by virtue of its constitution, including the power and duty to protect and preserve to its citizens certain natural and unalienable rights, including the acquisition, possession and protection of property and of pursuing and obtaining safety and happiness. This suit is instituted * * * for the use and benefit of the plaintiff as the owner of the property hereinafter mentioned and also as *parens patriae* for the use and benefit of its citizens. * * *
>
> "4. From Atlantic Highlands southerly to Cape May, a distance of more than 100 miles, the easterly side of the State of New Jersey borders on the Atlantic Ocean. The portion of this Ocean frontage particularly affected by the acts of the defendant hereinafter complained of extends from Atlantic Highlands to Beach Haven, a distance of more than fifty miles, and is occupied by a continuous succession of adjoining municipalities, which, by reason of their broad and gently sloping beaches are adapted to, and their inhabitants are engaged in and rely for their livelihood chiefly upon, the business of maintaining summer resorts, where great numbers of people of all classes and conditions congregate from various parts of the United States in the pursuit of rest, recreation and pleasure.
>
> 5. The plaintiff possesses the sovereign ownership of lands along the shore and under the waters of the Atlantic Ocean below high water mark throughout its beach front within its territorial limits, and the use of said beaches and the waters adjacent thereto are common to all the people of the State."

The court will take judicial notice of the boundaries and territorial limits of the plaintiff, and that it borders

on the Atlantic Ocean on its eastern side. *Brown v. Piper*, 91 U. S. 37.

Annexed hereto as "Exhibit A," is the map of the coastal area involved in this suit which was annexed to the complaint. The boundary line between the states of New Jersey and New York is shown thereon by a broken line, which runs through the words "Raritan Bay." From that boundary southerly the State of New Jersey borders on the Atlantic Ocean for a distance of about 100 miles to Cape May.

The beach front affected by the subject matter of this suit is about 70 miles long, and extends from Sandy Hook and Beach Haven, embracing twenty-nine consecutive municipalities as follows:

Highlands
Sea Bright
Monmouth Beach
Long Branch
Deal
Allenhurst
Asbury Park
Ocean Grove
Bradley Beach
Neptune City
Avon
Belmar
Spring Lake
Manasquan
Sea Girt
Brielle
Point Pleasant
Bay Head
Mantoloking
Lavallette
Seaside Heights
Seaside Park
Township of Berkeley
Barnegat City
High Point
Surf City
Ship Bottom-Beach Arlington
Long Beach
Beach Haven

all of which are seashore resorts, possessing the sole attraction of the sea and beach for fishing, boating, bathing and other recreational purposes. Their assessed valuations in 1929 was $139,599,751.00 (Pl. Ex. 69, R. 100).

Proprietary Rights.

Plaintiff has title to the shore, between high and low water marks, and to the bed and waters of the marginal sea, below low water mark, adjacent thereto, within its territorial limits, according to the rule of the common law and the law of nations, by virtue of the Definitive Treaty of Peace between the United States and Great Britain, 1783, Article I (1 *Malloy's Treaties, &c.* 587), and its Constitutions of July 2, 1776, Article XXII (1 *N. J. Comp Stat.* xxxii), and June 29, 1844, Article X, par. 1 (1 *N. J. Comp Stat.* xlvii). *Hist. and Law of the Foreshore and Seashore, Moore & Hall,* 3d ed. (*Hale's First Treatise*) pp. 347 358, 367, (*Hale's de jure Maris*) 376, 379, 380; *Angell on Tide Waters,* pp. 19-37, 44; 3 *Kent's Com.* 427; *Gould on Waters,* Secs. 2-4, 32; *Farnham on Waters and Water-Rights, Secs.* 2-9, 10a, 11, 37a; 21 *Am. & Eng. Ency.* (2d ed.) 430; *Hardin v. Jordan,* 140 U. S. 371; *Martin* v. *Waddell,* 16 Peters 367, 407; *Arnold* v. *Mundy,* 6 N. J. Law 1; 14, 15, 94; *Gough* v. *Bell,* 22 N. J. Law 441, 455, 472; *Affirmed* 23 N. J. Law 624, 654; *Hoboken* v. *Penn R. Co.,* 124 U. S. 656, 690; *Russel* v. *Jersey Associates,* 15 How. 432; *Rundle v. D. & R. Canal Co.,* 14 How. 80; *Manchester* v. *Mass.,* 139 U. S. 240, 258, 260, 264; *Cunard Steamship Co.* v. *Mellon,* 262 U. S. 100; *N. J. Pamphlet Laws,* 1906, p. 542; *Corfield* v. *Coryell,* 6 Fed. Cas. 546, 549.

Of this beach frontage of approximately 70 miles, plaintiff has granted to its citizens 64,818 lineal feet and to its municipalities 13,270. Plaintiff retains title to 285,055 lineal feet (Exhibit 346) in which, together with all the bed and waters of the marginal sea below low water line adjacent to its entire coastline, it has a direct proprietary interest.

Plaintiff, as quasi-sovereign, has a substantial interest, independent of and behind the title of its citizens, in

the land and seashore, which it did not surrender under the federal constitution, and which it can protect in this court. *Georgia* v. *Tenn. Copper Co.*, 206 U. S. 230.

Parens Patriae.

Plaintiff sues also in the character of *parens patriae*.

Grants of riparian lands to private parties are authorized by act of the legislature of New Jersey, approved March 21, 1871 (N. J. P. L., p. 44), reading as follows:

> "Sec. 1. That any riparian owner on tide-waters in this state who is desirous to obtain a lease, grant or conveyance from the state of New Jersey of any lands under water in front of his lands, may apply to the commissioners appointed under the act to which this is a supplement and the supplements thereto, who may make such lease, grant or conveyance with due regard to the interests of navigation, upon such compensation therefor, to be paid to the state of New Jersey, as shall be determined by said commissioners, which lease, conveyance or grant shall be executed as directed in the act to which this is a supplement and the supplements thereto, and shall vest all the rights of the state in said lands in said lessee or grantee" (Rev., 1877, p. 987; 4 *N. J. Comp. Stat.*, 4390).

Grants of riparian lands to municipalities are authorized by Chapter 202 (P. L. 1903, p. 387), reading as follows:

> "Sec. 1. Whenever any public park has been or shall hereafter be laid out or provided for by ordinance of any city or other municipality, under the authority of any act of the legislature of this state, along or fronting upon any of the tide waters of this state, and whenever any streets or highways shall extend to said tide waters, such municipality may apply through its legislative body to the commissioners appointed under the act to which this is a further supplement, for a grant or conveyance to such city or municipality of the lands under water

within the limits of said public park, and of the land in front of said streets or highways; such grant to contain a provision that any land under water granted or conveyed for park uses shall be kept and maintained as an open public park or place for public resort and recreation, and that no building or other structures shall be erected on such park or on the lands under water so granted and conveyed inconsistent with its use as a public park or place for public resort and recreation; provided, however, that public walks and drives may be constructed along or upon any portion of the land so granted or conveyed" (4 *N. J. Comp. Stat.*, 4397).

"Such lands may be granted to a municipality constituting a political division of the state, for the promotion of the commercial prosperity of the municipality and consequently of the people of the state." 21 *Am. & Eng. Ency.* (2d ed.), 436.

Such grants convey title subject to all rights of the public therein.

The rights of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness are guaranteed to the citizens of plaintiff by its constitution (Art. I, par. 1). The right and duty to protect them in those rights are attributes and obligations of sovereignty under our system of government. *Fontain* v. *Ravenel*, 58 U. S. 369, 393; *Angell on Tide Waters*, p. 23; *Georgia* v. *Tenn. Copper Co.*, 206 U. S. 230; *New York* v. *New Jersey*, 256 U. S. 296; *Missouri* v. *Illinois*, 180 U. S. 208; s. c. 200 U. S. 496.

On behalf of the municipalities and citizens who own shore frontage under state grants; the inhabitants of the municipalities involved and others who use the sea and the beaches for purposes of recreation; and those who are engaged in enterprises for the entertainment of visitors, plaintiff has an interest in the subject matter of this suit in its character of *parens patriae*, as the guard-

ian and protector of the property, health and welfare of its inhabitants. *Hampton* v. *Watson* (89 S. E. 81; 119 Va. 95; L. R. A. 1916 F. 189); *Angell on Tide Waters*, p. 27.

It therefore appears that the suit is one to protect the quasi-sovereign rights of the plaintiff.

(b)

The Defendant is before the Court.

Defendant raised no question of jurisdiction in its original answer. It was not until two days before the argument before the Special Master that it raised that question, in an application to amend its answer. Having accepted that jurisdiction throughout the proceedings of more than a year, and entered into its defense at large, it cannot now raise the question. 1 *Daniell's Chy. Pl. & Pr.* (*Am. Ed.*) 579.

However, let us consider the question on its merits. Defendant's contention is that, because it dumps its garbage and refuse on the "high seas," more than three miles from shore, its acts are committed outside the jurisdiction of the United States. At the same time it sets up, as its "First Defense," that it dumps its garbage at sea under permits authorized by the Act of Congress of June 29, 1888 (25 Stat. 209), amended, at places designed in such permits "and not within the navigable waters of * * * the United States" (*Am. Ans.* par. fifth, p. 8). These two contentions are legally inconsistent, and cannot be legally united in defendant. *Bouvier's L. Dict., Bald. Rev.*, (*"Incompatible"*) p. 533.

In *United States* v. *Various Tugs*, 225 Fed. 505, the United States District Court for the Southern District of New York held that the jurisdiction of Congress to protect the harbors "and adjacent channels and waters, may

be exercised beyond a marine league from shore." If defendant places any reliance upon the permits, or if, by soliciting those permits it places a practical construction upon the Federal statutes which necessarily involves jurisdiction at the dumping grounds, it cannot say that the jurisdiction of this court is not co-extensive with that of Congress or the Supervisor of the Harbor of New York?

Congress, and the Supervisor of the Harbor, have exercised, since 1888, and with defendant's acquiescence since 1918, an unchallenged, or sustained jurisdiction, over the dumping grounds as navigable waters of the United States. Defendant cannot now challenge that jurisdiction. *Prigg* v. *Pennsylvania*, 16 Peters 539, 567.

Like the Court of Chancery in England, this court is a superior court of general jurisdiction. It is insufficient to deny jurisdiction. It is necessary to show what court has jurisdiction to give a complete remedy. Courts of equity assume and exercise their powers over subject matters outside their territorial jurisdiction, if the parties are within their jurisdiction, "for a Court of Equity *agit in personam*, and may give effect to its decree by constraining the person or property of the defendant till he perform it." 1 *Daniell's Chy. Pl. & Pr.*, 652-3; 1 *Story's Eq. Jurisp.* Secs. 90-1; *Massie* v. *Watts*, 6 Cranch 148, 158; *Penn* v. *Lord Baltimore*, 1 Vezey 444; *Hart* v. *Sansom*, 110 U. S. 151, 154.

If the defendant's contention is sound a strange situation is presented. If it can carry the garbage beyond the three-mile limit it may dump it regardless of the damage caused on the adjacent shores or the extent of the nuisance thereby created. By the same token it might go to the same place and fire a cannon toward, regardless of how much damage it did on, the shore. Plaintiff would have no remedy. Equity suffers no wrong to be without a remedy. 1 *Story's Eq. Jurisp.*, Sec. 94.

(c)

The property affected is within the United States.

The Court will take judicial notice that the shores and the marginal sea of plaintiff are within the United States. *Pearcy v. Stranahan*, 205 U. S. 257.

As will appear later, defendant was never in ignorance of the fact that plaintiff's waters and shores were affected by the garbage and refuse dumped by it at sea.

Justiciable Controversy and Jurisdiction.

The findings of the Special Master of the existence of a justiciable controversy and of the jurisdiction of this court is amply sustained by the facts and the law.

(2)

Garbage and refuse in large quantities dumped by the defendant in the Atlantic Ocean more than a marine league from the shores of the waters of the plaintiff is driven and carried by the winds and waters to and upon the beaches of the plaintiff and its adjacent waters, thus creating a public nuisance to the great injury of the plaintiff's rights and property.

Under this heading defendant has grouped its exceptions 12 to 43, inclusive, which challenge the Master's findings that defendant's dumping of garbage creates a public nuisance in the waters and on the shores of the plaintiff.

Legal Rights.

The primary uses of the sea are navigation and fishery (*Gould on Waters*, 1). The right of fishery within one marine league of the shore vests exclusively in the people of the adjacent state. 1 *Moore Int. L. Dig.* 717, 718, 719; 1 *Farnham, Waters and Water Rights*, p. 9; *Corfield v.*

Coryell, 6 Fed. Cases 546. The free use of the ocean, for navigation and fishing is common to all mankind (1 *Kent Com.* 27, 3 *Kent* 410, 412, 414, 416; *Martin v. Waddell's Lessee*, 16 Peters 367).

The most valuable perquisite of the exclusive ownership of water is the benefit of fisheries therein.

The free use of the seas is, however, limited by the proviso that there shall be no interference with the equal rights of others. *Sic utere tuo ut alienum non laedas. Angell on Tide Waters*, p. 15. *Gould on Waters*, Secs. 17, 21, 86, 87; *Farnham on Waters and Water Rights*, Secs. 1, 23.

The public right of fishery on the shore and in the sea, is second only to navigation in importance and value. It provides the sustenance which Lord Hale mentions as one of the principal reasons for sovereign title to the marginal sea. *Hardin* v. *Jordan*, 140 U. S. 371, 381; *Arnold v. Mundy*, 6 N. J. L. 1, 14, 94; 1 *Moore Int. L. Dig.* 699; 21 *Am. & Eng. Ency.* (2nd Ed.) 439; *History and Law of the Foreshore and Sea Shore* (*Moore & Hall*, 3rd Ed.); *Hale's DeJure Maris*, 384, 385, 669, 850; *Angell on Tide Waters*, pp. 20, 22-24, 124-5, 132; 3 *Kent's Com.* 412; 13 *Am. & Eng. Ency.* (2nd Ed.), pp. 556, 559, 562, 565; *Corfield v. Coryell*, 6 Fed. Cas. 546, 549, 551; *Paul v. Haselton*, 37 N. J. Law 106; *Smith v. Maryland*, 59 U. S. 71.

The most extensive use of plaintiff's seashore is for surf bathing purposes. The common right of bathing on the public waters has ancient recognition and is supported by eminent authorities. *Blundell* v. *Catterall*, 5 B. & A. 268; *Angell on Tide Waters*, 17-18, 28-35, 192; *Halls Essays on Rights of Crown in Seashore* (3d Ed.) 523, 542; *Gould on Waters* (3d Ed.) Sec. 26; *Farnham on Waters and Water Rights*, Sec. 37; 21 *Am. & Eng. Ency.* (2d Ed.) 439.

Garbage and Refuse Dumped at Sea.

Defendant admits that for many years it has dumped the garbage and some refuse in the Atlantic Ocean (Amended answer, p. 8). Its Exhibit No. 12 shows the following quantities:

Year	*Cubic Yards*
1925	1,517,984
1926	1,308,119
1927	1,219,416
1928	1,378,572
1929	1,478,165

The average weight of New York City garbage is 1150 lbs. per cubic yard. (*"Collection and Disposal of Municipal Refuse," Hering & Greeley*, McGraw-Hill Book Co., 1921, p. 46.) Translated into tons, the amount dumped in 1929 equals 849,945 tons, or about 2833 tons per working day. During the summer of 1929 defendant dumped as high as 192,000 cubic yards a month at sea (R. 560).

Prior to 1896 defendant dumped its garbage and refuse at sea. The practice was discontinued from that year until 1903 when it was resumed until 1906. From 1906 until 1917 garbage and refuse were handled in reduction plants on Barren Island and Staten Island (Exhibit 347, p. 7; R. 566-7).

The present practice of dumping garbage and refuse at sea began in August, 1917, when the reduction plant at Barren Island burned (Pl. Exhibits 298; 324, p. 1896) and the quantity was increased in November, 1918, when the reduction plant at Staten Island ceased operation (Pl. Ex. 325, pp. 1997-8). When the Barren Island plant burned, the Supervisor of the Port, "At the request of the New York City Commissioner of Street Cleaning and at the urgent solicitation of the Commissioner of Health," issued permits for dumping of garbage at sea "as a tem-

porary measure, to continue for two or three months only." (Pl. Ex. 326, pp. 1993-4.) The "urgent solicitation of the Commissioner of Health" referred to, was a letter from Dr. Copeland to the Supervisor of the Harbor, dated August 8, 1918, which described "a very serious situation, and we hope it will not long continue. * * * but I want you to understand that we do not contemplate any permanent use of so inadequate a system. It is simply a temporary expedient to bridge over an emergency." (Pl. Ex. 298; R. 449.) The "request of the New York City Commissioner of Street Cleaning" referred to was a letter dated August 17, 1918, from A. B. McStay to the Supervisor of the Harbor requesting "that a temporary permit be granted for dumping of the said material (garbage) at sea until about the 15th of September" (Pl. Ex. 298, R. 450).

No other means having been provided in the meantime, the Secretary of the defendant's Department of Health wrote to the Supervisor of the Port of New York on October 5, 1918, stating "The City of New York is faced with an acute situation approximating a public nuisance in relation to its garbage disposal.

* * * * * * * * *

The City of New York is now in the throes of a so-called 'influenza' epidemic * * *.

May we request you, therefore, to grant permission * * * to take scows of garbage to sea and dump same * * * until such time, in the near future, when New York City shall be able to make other provision for the disposal of its garbage?

We thank you for your consideration in this matter and trust that you may find it possible to assist the City of New York in this emergency" (Pl. Ex. 298; R. 450).

The practice thus began as a "temporary expedient to bridge over an emergency," has continued to the present day, with constantly increasing deposits of garbage at sea.

Official Objections.

In 1907, three distinguished engineers, H. DeB. Parsons, Rudolph Hering and Samuel Whinery, were appointed by Mayor McClelland of New York City to make an investigation and report on an improved and more effective system of street cleaning and waste disposal. The following is an extract from their report:

"*Dumping at Sea.*

All the refuse collections could be dumped into the Atlantic Ocean, *but unfortunately the least harmful material sinks and the foulest floats, so that much of the floatable mass will be scattered along the beaches, through the action of current and wind. This fouling of the beaches creates a nuisance that the public should not be asked to tolerate.* The cost of sending the scows so far to sea that there would be no danger of fouling the beaches, and the delays and interruptions caused by storms and ice, forbid the use of this plan. *The dumping of refuse at sea should not be resorted to except in cases of emergency, when the period of such sea dumping will be of short duration.*" (Italics ours.) Exhibit 346; p. 100, R. 856.)

In 1921 the subject of the collection and disposal of city waste was referred by Mayor Hylan to a committee of ten heads of city departments, including Dr. Copeland, Commissioner of Health. Their report includes the following statements:

(p. 5) "Since October 2nd, 1918, all garbage from the Boroughs of Manhattan, The Bronx and Brooklyn has been disposed of by dumping at sea."

(p. 19) "The greatest objection to the present system of disposing of waste material is in connection with the method now being used for getting rid of garbage, which is both unsanitary and uneconomical.

> * * *. Aside, however, from the question of cost, it seems undesirable to dump garbage at sea as it is being done at present. It is known that the Federal authorities quietly resent, if they do not openly object to it, and there is always the possibility of objections from other communities which have in the past claimed that they have been injured by the practice. When these objections become sufficiently strong it may be that New York will find itself so unprepared as to be unable to quickly introduce a more satisfactory form of disposal." (Exhibit 347; R. 657.)

Mr. Kenneth Allen, Sanitary Engineer of defendant, in a paper published in the "Proceedings of American Institute of Civil Engineering," November, 1926, stated:

> * * * "but the floating refuse is unsightly, and with winds in the quarter of the southeast, there is always the probability of its reaching the shore and fouling the beaches" (R. 658).

and in an article, published in "Municipal Sanitation," January, 1930, page 16, entitled "How New York Handles Her Garbage and Rubbish Problem," Mr. Allen states:

> "Many complaints have been received from owners and lessees of Long Island and New Jersey bathing beaches, of rubbish and garbage which drifts at times to the shore and strand there." (R. 658.)

The annual reports of the Supervisor of the Harbor to the Secretary of War, and incorporated in his annual reports to Congress, contain many references to the objectionable features of dumping of garbage at sea; some of which are as follows:

> "Garbage deposited at sea, no matter what the distance from shore, is apt to wash up on the beaches. the operation is likewise expensive. It would be an advantage to the neighborhood of the beaches to secure legislation against such practice, and to the city to dispose of its garbage in sanitary and unobjectionable purifiers" (Plaintiff's Exhibit 325, pp. 1997, 1998).

This statement from the report of 1919 is repeated each year in the annual reports of the Supervisor of the Harbor from 1919 to 1929, inclusive (Pl. Exhibits 326, pp. 1966, 1994; 327, p. 2016; 328, p. 2135; 329, p. 1980; 330, p. 1979; 331, p. 1894; 332, pp. 1892, 1893; 333, p. 1915; 334, p. 2013; 335, pp. 2080, 2081).

The following is a statement made in 1930 by Captain Walter S. Anderson, Supervisor of the Harbor:

> "Garbage is a sore subject. The War Department has for a good many years, directly and by the supervisor, urged New York City to provide other disposition of its garbage and refuse than by dumping it at sea." (*U. S. Naval Institute Proceedings, Vol. No. 56, No. 7, Whole No. 329, July*, 1930, *p.* 577.)

The Supervisor's reports also show that as early as 1920 he had "frequently discussed with the city concerning the question of a suitable alternate plan of disposing of such material." (Pl. Exhibit 326, p. 1994); that the designated dumping grounds were at times changed "to obviate the complaints from the beach resorts of New Jersey and Long Island in regard to contamination from this refuse" (Pl. Ex. 331, p. 1894); and that "many complaints have been received from owners of property and from visitors along the New Jersey coast of rubbish and garbage coming in on the beaches, especially during northeast storms and protracted periods of easterly winds." (Pl. Ex. 335, p. 2081.)

Defendant promised the United States Government in 1921 to eliminate dumping garbage at sea. It received complaints from garbage reaching the beaches on Long Island and in New Jersey, (R. 578).

In 1923 citizens and public officials of shore municipalities of New Jersey and Long Island joined in the organization of the "National Coast Anti-Pollution League" for the purpose of combatting the public nuisance created by defendant's dumping of garbage at sea. The minutes of

two of its meetings; one held at Asbury Park, N. J., on August 23, 1923, and another held at Long Beach, N. Y., on September 19, 1923, were offered in evidence as Pl. Exs. 258 and 267, respectively.

Plaintiff's Exhibit 298 contains a statement, with accompanying correspondence, reviewing the efforts of plaintiff's Governor, George S. Silzer, during the years 1923 to 1925, inclusive, to procure, by negotiations with the defendant and complaints to the War Department, some relief from defendant's garbage nuisance (R. 445-469). Among that data are a letter (Sept. 10, 1923) from the Secretary of War, stating that only temporary permission was given "on the understanding that the practice of dumping at sea was regarded as *highly objectionable* and that the city was expected to provide other methods of disposal as soon as possible"; a letter (Dec. 18, 1918) from the Supervisor of the Port to Mayor Hylan of New York City, referring to previous experience with dumping garbage at sea and stating "I feel that I should not be called upon to jeopardize the health of residents and sanitary conditions of the beaches along Long Island and New Jersey coast by modification of the conditions as to deposit of *such offensive material* as at present in operation * * * As I have already stated to you in my previous communication, the deposit of this material at the mouth of the harbor *is most objectionable from every point of view*"; and a letter (July 9, 1925) from the Secretary of War stating "The objectionable features of which you speak are appreciated, and I am urging the Mayor of the City of New York to use his influence in the matter of providing other means of garbage disposal." (Italics ours.)

Plaintiff's Exhibit 299 contains a statement, with accompanying correspondence, reviewing the efforts of plaintiff's Governor, A. Harry Moore, during the years 1926 to 1928, inclusive, in the same direction. (R.469-472.) Among the data included are a letter (July 1, 1926) from the Se-

pervisor of the harbor stating that the only solution of the problem is the erection of incinerators to dispose of the garbage without dumping at sea. "Constant pressure is being brought to bear on the municipal authorities"; a letter from the Secretary of War stating that he had instructed the Supervisor of the Harbor "to take necessary action to insure that none of the New York City garbage reaches the New Jersey coast" and also that he had called the attention of the Mayor of defendant to the "objectionable features of this method of garbage disposal and the importance of the early completion * * * of incinerators * * *"; a letter (July 18, 1927) from the Acting Secretary of War, stating:

"As you know the Federal laws prohibit the discharge of refuse matter into the navigable waters of the United States are primarily intended to protect navigation, being based upon the power reserved to Congress by the commerce clause of the Constitution to regulate and protect interstate and foreign commerce. Accordingly, this Department does not consider that it is authorized to control the discharge of refuse matter which has no injurious effect upon navigation, but is harmful merely on account of causing objectionable deposits on bathing beaches or other property."

* * * * * * *

"The War Department has communicated several times with the Mayor of New York urging early completion of this program and, while it seems that the Department has done everything it can to improve the situation, it will again call the matter to the attention of the proper officials of New York."

Plaintiff's Exhibit 336 is a letter dated July 9, 1925, from the Acting Secretary of War to Mayor Hylan of New York City, reading as follows:

"Referring to the present practice of the City of New York of disposing of garbage by dumping it at sea outside of Sandy Hook, I would inform you that the Governor of the State of New Jersey has protested

to the Department against the continuance of such dumping as a nuisance, a detriment to health, and, as in many cases, almost destroying beaches both of New York and New Jersey for bathing purposes.

As you are doubtless aware, deposits of this kind are forbidden by the Act of Congress approved June 29, 1888, as amended by Section 3 of the River and Harbor Act of August 18, 1894, excepting under authority of a permit granted by the Supervisor of the Harbor.

That official gave permission for such dumping as an emergency measure soon after the destruction of the Barren Island Garbage reduction plant in 1917. The action was on the understanding that the city would immediately take steps to dispense with the practice. It appears, however, that it has been continued to the present time, and that there has been considerable delay in the completion of other means of disposal.

In view of the representations made to the Department by the Governor of New Jersey and others concerning the objectionable features of such dumping, I feel constrained to advise the Supervisor that steps must be taken to terminate the privilege as soon as possible, and I wish to ask that you will urge upon the proper city officials the necessity of promptly taking action to dispose of garbage otherwise than by dumping at sea."

Plaintiff's Exhibit 337 is a letter dated July 18, 1927, from the Acting Secretary of War to Mayor Walker of New York City, reading as follows:

"Reference is made to previous communications from this Department urging that the City's program of construction of garbage incinerators be pressed to completion as rapidly as possible.

The Department is again receiving numerous protests against the present method of disposing of New York City garbage by dumping at sea and I desire, therefore, to renew at this time the suggestion that every possible effort be made by the City to expedite the completion of sufficient incinerators to dispose of all its garbage so that this objectionable dumping may be discontinued."

About 13 years ago Dr. Copeland, Health Commissioner of New York City, came to Deal to attend a meeting held to do something about the garbage. At that time Dr. Copeland stated that the city was building incinerators and he promised to take the matter up with Mayor Hylan but that was all the citizens of Deal ever heard of it (R. 240). The officials of Belmar complained to the War Department; the reply from that department stated it was trying to do all it could to bring relief. (R. 257-8).

On four or five occasions during the past four years inspectors from defendant's Street Cleaning Department have visited the beach at Long Branch to inspect the garbage accumulations there. One of those inspectors who came in August, 1929, told Mr. Porter, who operates a swimming pool at Long Branch, that he had travelled all the way up the coast and had found the same conditions all the way up. There was garbage on the beaches (R. 320).

Governor Larson's testimony shows that the pledge to clean up the beaches of New Jersey by stopping the nuisance of garbage from New York was in the Republican platforms of New Jersey every year from 1923 to 1929, both inclusive, and in the Democratic platforms of New Jersey for four of those years. It was discussed in annual messages of Governor Silzer in 1924 and 1926; of Governor Moore in 1927; and of Governor Larson in 1929. It was the subject of joint resolutions of the legislature in 1927, 1928 and 1929 (Plaintiff's Exhibits 66, 67 and 68). This suit was brought pursuant to the instructions of the legislature contained in the resolution of 1929. (R. 98-101.)

The Proof.

Appendix "B" to this brief gives a list of 263 different kinds of articles identified on the garbage scows, in the sea and on the shore, connected up between the scows and the shore, with page references to each place in the record where each article is mentioned. The letters "N. Y." after a page number means that at that place in the record that particular article is identified as having come in the garbage from New York City. To avoid tedious repetition these articles will be referred to by the general term "Garbage."

Two hundred and twelve witnesses testified, and three hundred and forty-seven exhibits were offered, on behalf of the plaintiff.

An alphabetical list of the witnesses, with page references to their testimony, both in the stenographer's minutes and the printed record, and a descriptive list of the exhibits with like page references, are printed at the beginning of the record (pp. i-xxii).

Dumping and Drifting of Garbage.

During the summer of 1929 Mr. Smack made a special study of the garbage situation on beaches and at sea. With Gustave Holgarson and James Hall as members of his crew, he went out on thirty-four different occasions to observe where the New York City garbage scows dumped their garbage and what it contained (R. 13). On fourteen of these occasions they were close by when the scows dumped and they deposited postcards in bottles, self-addressed and stamped, bearing a request for the name of the finder, with place and date of finding, and that it be mailed. They were addressed to Mr. Smack (R. 7). Sixty-one of these cards came back by mail from finders on beaches from Long Island, New Jersey and New England.

On May 22, 1929, he observed the largest and fullest garbage dump that he had seen. Three loaded scows dumped and some other loaded scows were going in the same direction. The returning scows left a trail of garbage in the sea after them. He followed the trail, for two miles, to the dumping place where he found garbage strewn over the surface of the sea for an area seven miles long and two miles wide (R. 9, 14). He was present when two other scows were dumped that day. Piles of garbage remained along the ridge of the scows which dropped off into the sea. These scows bore the initials D. S. C., representing the Department of Street Cleaning of the City of New York and another identification letter which was used in the place of numbers.

On June 30, 1929, he saw three New York City scows dump garbage eighteen miles southeast by east of Scotland Light. He ran into the mass while the dumping was in progress. In addition to the body of a perfectly formed child, the garbage contained a great many different articles which are enumerated in a list he made at the time and read into the record (R. 10). They are included in Appendix "B." That list tallies with the articles enumerated by other witnesses who testified to conditions on the shore. The different kind of articles contained in the garbage in the scows, in the water and on the shore are so numerous and some of them are of a nature and condition so disgusting and revolting that they will not be separately mentioned.

On that date Smack saw a number of scows dumped. Garrett Johnson took pictures, which were offered in evidence and identified by Johnson and Smack as being representative of conditions which existed at or near the dumping grounds and on the scows on their way in, with large masses of garbage clinging to the ridges which was pushed into the sea by the attendants as the scows neared the shore.

On July 17th Smack went out again with Johnson, Hall and Helgarson (R. 11), and took other pictures of the dumping grounds and a trail of grease and garbage on the sea. On that occasion the list of articles that they saw on the scows or in the garbage as dumped are the same as those listed on June 30, 1929 (R. 9, 10). Those articles compared generally with what he saw in the scows dumped in the sea on the fourteen different occasions when he actually saw scows dumping (R. 11).

Stormy weather holds back the scows, otherwise they dump every day, but when they have been held for a day or two, particularly in warm weather, the smell of the garbage on the scows will conquer everything but a very strong stomach. The day he saw the infant in the garbage it was particularly bad smelling and made him sick (R. 11).

The type of scows are shown clearly in Johnson's pictures. These side dumping scows invariably have a large amount of garbage clinging to the ridge which gradually falls off on their return. Exhibit 5 shows men cleaning ridge line of a scow. They do not start cleaning until they are within three or four miles of Scotland Light and the cleaning continues until they have passed that light and are within approximately four miles of Sandy Hook (R. 12).

Exhibits 4 to 11 also show scows and the accumulation of garbage hanging on after they have dumped. The cleaning of these scows on the way in leaves a trail of garbage and grease on the sea which can be followed for miles (R. 13).

Exhibit 12 shows a tow of scows returning empty. The lighter section of the water shown in this picture is the wake of grease and slick from the garbage which is left in the water after the scow passes. The grease is of a peculiar type and consists of little flecks from the size of a person's fingernail down to minute particles. It

comes from the meats and greasy substance in the garbage (R. 13).

After the scow dumps the mass of garbage which they have is sometimes piled as high as a foot above the water. Displacement gradually takes place; the heavier stuff finds its way through the mass and sinks to the bottom, leaving the lighter material floating on the surface. Exhibits 15, 18, 19 and 22 shows these conditions (R. 13, 14).

Exhibits 13, 14 and 15 show the density of the mass which actually supports objects out of the water. When the additional scows dump the mass spreads out and increases, according to the number of scows dumping, before the first dump has been dispersed by the action of the water (R. 14).

Smack observed two tows of three scows each dumped so close together in time and place that the mass of garbage of the six scows formed one island covering an area of at least seven miles long (R. 14). On one of his trips he sailed along one of these floating islands of garbage at the rate of seven miles an hour for forty-three minutes, or a distance of over five miles.

On May 22, 1929, he saw twelve scows of garbage dumped. The mass was so dense that it was necessary to repeatedly reverse the motor to clear it of stuff that clogged the propeller and stopped the boat. The vegetable and animal matter was in the process of decay and was offensive to sight and smell (R. 14, 15).

Exhibits 16 to 24, both inclusive, show areas of garbage in mass and in process of distribution as it drifted toward the New Jersey shore (R. 15).

Exhibit 13 shows men cleaning the barges as they were passing Scotland Light on the way in. Large quantities of garbage were still dripping from the scows leaving a trail of garbage on the sea. He has seen men clean

scows and throw garbage into the water three hours after dumping took place. He has seen them push off as much as 25 cubic yards on the way in (R. 16).

He repeatedly observed the action of the wind and tide on the garbage mass. Invariably moved ahead of the wind regardless of the direction of the tide. When the wind blew from the west the movement of the garbage was off-shore. If the wind came from the east, the movement was toward the Jersey shore. When the wind came from the south it moved toward the Long Island shore (R. 15).

On a northeast wind the garbage floats toward New Jersey shore. He has seen it go all the way to the shore. He has seen it work north ahead of a wind from the south and when the wind shifted to the northeast the mass of the garbage drifted toward the shore (R. 16). As it approaches the shore the garbage becomes involved in the undertow and when it gets inside of the breakers it is thrown in a mass in the water and is distributed on the shore. The garbage fills the shore water with so much grease that soap will not work on bathers who have been in that water. A horrible mass of garbage is left on the beach, which has to be cleaned up as well as possible, but the grease is left on the sand and sticks to the feet of the people walking on the beach and clings to their toes (R. 16, 17).

In sailing around the edge of a floating mass of garbage at sea he could look into the water and see the stuff dropping down from the floating mass. As the density of the mass was relieved these heavier articles were released and began to sink, but the lighter stuff drifts ahead of the wind and is deposited on shore (R. 17).

Sometimes the garbage is carried as much as ten miles to the north ahead of the wind and when the wind changes to the northeast or to the northward the garbage imme-

diately changes to the direction toward which the wind is blowing. If the wind is from the northeast at the time of dumping the garbage will strike the shore approximately ten miles further south than under the other conditions (R. 19).

The garbage floats in large masses over the surface of the water for an appreciable length of time after dumping. It sometimes floats in such masses for five hours before being dispersed. He has followed the trail of garbage, which he has seen dumped, in a definite line continuously to the beach, from approximately twenty miles southeast of east by Scotland Light. He stayed with it and traced the course and direction for four and one-half hours when the wind was blowing at the rate of about thirty miles an hour (R. 24). He studied the tides and courses of the ocean off the New Jersey shore and found that anything that floats on the surface is not appreciably affected by the tide when the wind is blowing at all hard. Floating objects are driven before the wind and even heavy objects which settle to the bottom near the shore are worked up on the beach by the waves and undertow. His observation has been that the wind affects the water and the movement of objects in it at depths as great as 18 feet (R. 25).

Forsman and Hall confirmed this testimony in detail (R. 231-234).

Exhibit 205 is a U. S. C. & G. S. map of July 25, 1935, on which Smack marked the locations where he has seen dumping of garbage take place. He marked points at twelve, nineteen and twenty-one miles. He also put an (x) on the map to indicate where he had seen the scows dribbling garbage on January 7, 1930 (R. 294). The twelve-mile point is about eleven and one-half miles off-shore from North Long Branch. The twenty-one-mile point is about nineteen and one-quarter miles off-shore

opposite Asbury Park. The most frequent dumping grounds he saw was between the nineteen and twenty-one-mile points opposite the beach between Deal and North Asbury Park. He also saw dumping between the twelve and twenty-one-mile points, which would be opposite the beach from North Long Branch to North Asbury Park. The compass on this map will show the direction the garbage would float in an east or northeast wind. Whatever is on the surface of the water goes ahead of the wind (R. 295). Any wind from the east or northeast carries the garbage toward the New Jersey shore. The wind does not have to blow hard to blow the stuff in. A mild wind will do it, but it takes longer to reach the shore (R. 296). The tide has very little effect on the garbage. The wind has the greater effect (R. 297). He has followed the garbage when it was coming in ahead of an east wind.

John G. Haas, Deputy Inspector of Barges, office of the Supervisor of the Port, investigated floating garbage dumped by New York City at sea on six trips made in February, March and April, 1929. When the garbage is dumped it stretches out a mile or so, 30 or 40 yards wide. Wind influences the movement of garbage on the surface (R. 636). On March 1, 1929, three scows dumped eight miles southeast of Scotland Light. The garbage drifted to within nine miles of Long Beach (Long Island) in twenty-four hours (R. 637).

On March 19, 1929, three scows dumped eight miles southeast of Scotland Light at a point about twelve miles from the Jersey shore. In twelve hours it had drifted to within three miles of the shore at Long Beach. There was a twenty-five mile an hour wind and the garbage drifted thirteen or fourteen miles during twelve hours (R. 637), and had distributed itself over an area greater than he could see from his boat. On February 25, 1929, two scows dumped eight miles southeast by east of Scotland Light. He followed it from 5:50 P. M. to 11 A.

M., the next day. The garbage worked northerly for four or five hours and then back to the southward; then to the westward toward the New Jersey shore. A thirty-five mile wind toward the Jersey shore compelled him to leave the garbage when it was approximately six miles from that shore and moving in that direction (R. 637, 638).

On March 11, 1929, three scows dumped eight miles southeast by east of Scotland Light and the garbage drifted eastwardly before a southwest wind. On February 22, 1929 he followed the garbage for twenty-four hours and in that time it drifted approximately eighteen miles without much wind (R. 638). April 4, 1929, three scows dumped twelve miles southeast by east of Scotland Light. He followed it for twenty-four hours. It drifted from eight to ten miles in that time (R. 639).

Mr. Johnson accompanied Smack, Forsman and Hall on some of the trips and took pictures (R. 299). These pictures show the garbage floating on the sea after the dumpings. (Pl. Exs. 12, R. 300; 14, R. 301; 15, 16, 17, 18 and 19, R. 302; 21 and 22, R. 303; and 24 and 29, R. 304); show scows returning after dumping with quantities of garbage clinging thereto or being pushed off into the sea. (Pl. Exs. 3, 4, 5, and 6, R. 299; 7, 8, 9, 10 and 11, R. 300; and 23, R. 303); and the trail, or "slick" of grease testified to by numerous witnesses. (Pl. Exs. 12, R. 301; 20, R. 302). The garbage which Johnson saw in the mass dumped by the city scows contained wooden things; crates, boxes, pieces of lumber, short sticks 3 or 4 inches wide, house utensils, brooms, brushes and handles. There was a considerable proportion of wood in the garbage. They saw some dumps where there was more wood than in others (R. 306).

Interference With Navigation and Fishing.

Free fisheries are those carried on by means of hooks and line, drifting gill nets, lobster pots and tackle on the bottom and such other forms as do not provide fixed objects on or near the surface of navigable water.

> "An obstruction is such an impediment as renders navigation less convenient, less secure, and less expeditious.
>
> Thus, wire cables and ropes, anchors, gaspipes, weirs, accumulations of logs, embankments and jetties, and deposits of sewage and *debris* have been decided to constitute obstruction * *." (Italics ours).
>
> 21 *Am. & Eng. Ency.* (2nd Ed.), p. 443.

Markus is Commodore of the Yacht Club at Belmar. He described the conditions of floating garbage which they encounter at sea when sailing their boats, for fishing or other purposes. The garbage accumulates in the yacht club basin and has to be cleaned out as fast as it comes in. He has seen at Sea Girt a hundred men sitting around waiting for a change of tide to carry the floating garbage out of the shore waters so they could begin fishing. (R. 270-1).

Mayor Barbour of Rumson, N. J., sails a yacht off the coast of Seabright and gives his experience in watching the defendant's scows dump at sea and following the drifting garbage to the shore. (R. 91-3).

The Fishermen.

Twenty fishermen testified to conditions of garbage in the waters off plaintiff's shores, where they have been engaged in fishing with nets and lines, and with lobster pots, for periods ranging from four to seventy years. (Voorhees R. 36-41; Schweitzer R. 42-47; DeCamp R. 47-50; Peterson R. 50-52; Anton Holgarson R. 52-5; Carl Holgarson R. 55-7; Oleson R. 75-9; Gustave Holgarson R.

83-84; M. Hall R. 117-125; Cook R. 31-3; Carver R. 313-4; Haley R. 318; Popp R. 347-51; Jacobsen R. 373-6; Hines R. 393-4; Edward Phillips R. 397-402; Charles W. Phillips R. 402-4; Harry Peterson R. 408-10; Weeks R. 423-4; Hankins R. 153-6).

They go to sea daily, whenever weather conditions permit, and observe the defendant's scows dumping their garbage at sea and the effect of that garbage upon the water and the shore. Many of these men are lobster fishermen, who use strings of pots half a mile long anchored and buoyed at each end, with from thirty to thirty-five pots on a string. Portions of the garbage which sinks, and other portions that drift in suspension at various depths between the bottom and surface, such as rags, clothing, pieces of wire and rubber, drift into or upon the lobster pots and become entangled with the anchor and buoy ropes so as to render it difficult, and sometimes totally impossible, to lift the pots. (R. 351). In sailing their boats they often encounter areas of floating garbage, too dense to sail through without jamming the propeller or injuring the boat. They have to pick their way through thinner portions or sail around it. This garbage comes from the New York City scows and is more or less a regular thing every day. This garbage affects lobster pots five or six miles inshore from the dumping ground. (R. 402). Some of these fishermen have had to straighten the propeller of their boats as often as two or three times a season, in order to repair damage done by coming into contact with the floating garbage and accompanying rubbish. When the boats encounter the garbage they are required to slow down to somewhat less than half speed and pick their way through. They sometimes sail twenty to forty minutes, or for distances of from four to seven miles, through these garbage drifts. Some of the materials which settle upon or wrap themselves around the ropes, by which they handle their

lobster pots, are unfit to handle. These entanglements, together with the cutting of ropes by floating debris, frequently causes the loss of lobster outfits. One of these lobstermen lost sixty traps during one season. The material also kills the lobsters in the traps. (R. 351). The garbage consists of decayed animal and vegetable matter and all manner of debris.

From the dumping grounds these witnesses have followed continuous streaks of garbage all the way to the shore. It drifts according to the direction of the wind. Whenever the wind is from the east or northeast it drifts to the New Jersey shore. Their testimony positively identifies garbage on the beach and in the waters as having come from the New York City scows dumped at sea. Instances are mentioned where sticks and other material in the garbage have punched holes through the hull of boats.

The accumulation of the garbage on the beaches frequently prevents the launching or landing of the fishing boats. Men and horses are required to remove the material from an area large enough for such purposes. In 1929 this garbage destroyed 85 lobster pots belonging to one fisherman. (R. 77).

The garbage gives the water a milky color and is a filthy mess of decayed matter, and at their landing places on shore the fishermen have to get together and clean up the garbage beaches and bury the garbage in the sand. (R. 119). The amount of garbage dumped at sea has constantly increased and the resulting pollution in the water and on the bottoms has driven away the fish and substantially reduced the amount of the gains of the fishermen from their trade. (R. 154).

In all kinds of fishing that require nets, such as mackeral fishing, the garbage and refuse raise havoc with

the nets which become entangled in, and torn and destroyed by the sticks, tin cans and other rubbish. (R. 409).

The experience of these fishermen, more than half of whom have fished continuously since the defendant began to dump its garbage at sea in 1917, confirms in every respect the result of Smark's investigations in 1929 respecting the source of the garbage, its action on the water after dumping, its interference with navigation and fishing, the identification of the garbage on the shore as coming from that source, and the general effect of the garbage on the shore. They recognised the conditions shown in Johnson's pictures as representing those with which they have been familiar throughout their experiences. (R. 37, 39, 44, 45-6, 48-9, 50, 56, 75, 91-2, 117, 350).

Pound Fishing.

Pound fishing is carried on in a fixed location. A pound or trap is constructed of nets, and wings of nets are stretched out between the pound and the shore for the purpose of heading off schools of fish as they feed to the shoreward, and leading them through the opening into the trap by such a means as to prevent them of finding their way out. Since this method of fishing requires the exclusive occupancy of a certain area of bottom and water it is authorised and regulated by statute. The following statutory provisions of the plaintiff deal with this subject:

"*License to operate fish pound nets.* 1. It shall be unlawful for any person or persons, corporation or corporations, to erect, set, operate or maintain any fish pound nets in any of the waters of the Atlantic ocean, within three nautical miles from the coast line of this State, or in Sandy Hook bay or Raritan bay, without first obtaining a license for such purpose as hereinafter provided.

2. Applications for licenses for the purpose mentioned in the first section of this act shall be made to the Board of Fish and Game Commissioners. Said

board shall, upon the payment to them of the sum of fifty dollars for each fish pound net to be erected or set in the Atlantic ocean, and ten dollars for each pound net to be erected or set in Sandy Hook bay or Raritan bay, as a license fee, issue to the person or persons, corporation or corporations, applying therefor and paying said sums as aforesaid, if entitled thereto under the provisions of this act, a license duly signed by the secretary of said board to erect, set, operate and maintain a fish pound net in one of the waters above specified." (N. J. P. L. 1919, Chap. 94, pp. 214, 215; 1 N. J. Cum. Suppl. 1364, 1365).

These licenses are issued to authorize fish pounds within the exclusive territorial limits of plaintiff.

Following is a summary of the testimony of ten pound-fishermen: Meyers has been in the business for forty years. Bedsprings and boxes from the garbage and refuse in the water, tear the nets of his pounds in Galilee. This condition always follows an east or northeast wind. (R. 73-4.) Wooley has an investment in fishing pounds at Belmar between $18,000. and $20,000. and has been in business for twenty years. The value of his catches were: 1921, $55,000.; 1926, $44,000.; 1927, $41,000.; 1928, $29,000. The number of men employed were: 1926, 29; 1927, 24; 1928, 23. The garbage is getting worse every year. It tears holes in the nets and lets the fish out. It forms a scum and slime that accumulates on the nets which, with the dead things they collect from the garbage, drives the fish away and accounts for the decrease in catch as the quantity of garbage dumped increases. (R. 263-6.)

Frank Weber has been a pound fisherman at Monmouth Beach for 33 years and has encountered the garbage at sea as well as on shore. On one occasion he broke a propeller shaft while trying to extricate his boat from a sea of floating garbage. It damages their nets to the extent of from $2,000. to $3,000. in a single storm. His fish pound represents an investment of $40,000. At times the accu-

mulation of rubbish against the nets has swept them entirely away. He catches range from 800,000 to 900,000 pounds of fish a season, the value of which ranges from $35,000. to $50,000. per year. His expenses are about $30,000. a year and he employs 18 men. (R. 308-10.) His son, Fred, is associated with him in the business and supplemented his father's testimony regarding the difficulties and damage caused by the garbage. (R. 310.)

Prestley has been a pound fisherman for fourteen years near Galilee where he has an investment of $12,000. and employes ten men. His catches amount to about half of those of Frank Weber. The garbage tears his nets and lets the fish out. It causes damage to the extent of from $1,000. to $1,200. a year for ordinary repairs. (R. 311-2.)

Siciliano has been a pound fisherman at Long Branch for five years. He has an investment of $12,000. and caught 4,000 pounds of fish last year. He employs nine men. The garbage is pretty regular in the ocean around his pound. It creates an awful mess and smells bad when the sun shines on it. He has to collect and bury it in order to make a place to land his boats. The rubbish in the garbage cuts his nets. (R. 312.)

Fred Cook is a pound fisherman at Galilee and has an investment of from $12,000. to $14,000. His catch runs from 35,000 to 40,000 pounds of fish per season. The garbage and refuse becomes entanged in, and tears, his nets. Repairs on this account cost from $1,000. to $1,200. a year. He employs 12 men. The garbage is offensive to the smell and its accumulation on the beach renders it difficult at times to launch their boats. (R. 316.)

Swenson has been a pound fisherman at Manasquan for 25 years. The sticks in the garbage cut through his nets and the nets catch all manner of stuff. It has been necessary for him and his men to spend from four o'clock to ten o'clock in the morning to clean the stuff out of the

nets. It keeps the fish away. He has been required to use 15 men and four horses to clean the garbage off the beach before they can move their boats. Storms do not affect their nets except when they bring in the garbage and refuse and on such occasions they tear the nets to pieces. (R. 355-6.)

Fish pounds at Bradley Beach represent an investment of $50,000. and catch about $60,000. worth of fish a year. They employ 25 men. (R. 175.)

This testimony covers only a small part of the pound fisheries licensed by the plaintiff in the coastal area involved in this suit, which represents about three-quarters of the costal grounds used for such purposes. The latest official figures available at the time of the hearing were given by Governor Larson in Pl. Ex. 71. (R. 101.)

Coast Guards.

In the coastal stretch affected by this garbage there are 20 lifesaving stations of the United States Coast Guard Service (Appendix "A") between which patrols are constantly maintained to discover signs of vessels in distress. Like that of a fire department, the service for which the coast guards are called upon frequently requires the utmost expedition and precision, yet 17 coast guard officers testified to conditions caused by the accumulation of garbage on the beaches at their stations, which greatly hamper and interfere with their work, both as to launching of boats and conducting their patrols. (Bailey, R. 129-132; Newman, R. 133; Butler, R. 134-7; Townsend, R. 140; Gifford, R. 140-1; Parker, R. 141, 143-4; Wilbur, R. 144-5; C. Brower, R. 141-2; Salter, R. 142; Mitchell, R. 143; Perrine, R. 146; L. Brower, R. 145-6; Forsythe, R. 147; Cook, R. 147-8; Roswell, R. 148-150; Herbered, R. 307-8; Osborn, R. 308. These witnesses describe the measures they are required to take to remove the garbage from the beaches,

its decayed condition, the quantity and contents. It has to be removed to provide a way for launching their boats. At some of the stations three men are kept busy cleaning the beach in the summer time. (R. 146.) It must be promptly removed on account of its bad smell. (R. 146, 143.) It interferes with the use of their equipment. (R. 307) and with their boat drills (R. 308).

The Effect of Garbage Ashore.

Twenty-nine separate municipalities, with assessed valuations of approximately $140,000,000. (Pl. Ex. 69), occupying a continuous stretch of beach front of approximately 70 miles in length, are affected by the garbage conditions complained of. One hundred and eighteen witnesses testified to their personal experiences, in official or private capacities, with the nature and extent of the garbage in the water and on the beaches which interfers with the use thereof for fishing, bathing, and other recreational purposes. They show that at high tide the garbage is carried up on the beach and deposited throughout the whole width of the beach, between high and low water mark, as the tide recedes. They also show that with the aid of wind and high waves the garbage is carried under the boardwalks and buildings and into and across the streets to private properties, where it leaves accumulations of bottles and cans and offensive vegetable and animal matter. They show that it is offensive to sight and smell and that the odor enters the houses of the community and creates annoyance to the people in their homes; that it breeds and feeds swarms of flies which enter the houses; that it jeopardizes health and produces physical injuries and infections; that it occasions the expenditure of large sums of money to accomplish its removal and disposition; that it depreciates the value of property and creates an intolerable public nuisance which drives people away from the beaches.

It is impossible to summarize this great mass of testimony, or to describe the 347 exhibits, within any reasonable compass, although the magnitude of the injury inflicted would justify a somewhat extenuated discussion thereof. Some of the exhibits will illustrate this discussion.

Annexed hereto as Appendix "C" is a tabulation of figures given by witnesses from 17 of the municipalities, which happened to have the data in available form, showing, as near as could be ascertained from their records, the winter and summer populations, length of beach front, value of hotels and boarding houses, assessed valuation, cost of boardwalks, jetties, piers, pools, pavilions and pleasure places, value of private homes, cost of cleaning beaches, and the cost of bathing facilities. It shows that nine of the municipalities mentioned have spent for boardwalks $1,900,000.; five of them have spent for jetties to protect their beaches, $899,000. and the state has spent an additional sum of $838,494.28 for the same purpose (Pl. Ex. 70; R. 101); six of them have spent for piers $8,495,000; five of them have spent for pools, pavilions and pleasure places, $825,000.; fifteen of them spend an aggregate of something over $10,000.00 a year to remove the garbage from their beaches (in addition to the amounts spent for that purpose by private beach clubs, bathing industries, and by private individuals); and in seven of those municipalities $3,750,000. have been spent for bathing facilities.

Asbury Park.

The largest and most important seashore resort within the area affected by the garbage is the City of Asbury Park, a birdseye view of which can be obtained from plaintiff's exhibits 55 and 239-255. Other interesting pictures of recreational features are shown in plaintiff's exhibits 51 and 52, showing the convention hall and theatre; numbers 53 and 243, showing beach and boardwalk as used



EXHIBIT NO. 72. GARBAGE ON BEACH.

in the summer time; Exhibit 241 shows crowds on Easter Sunday; number 56, showing the Monterey and other hotels and the parked automobiles of visitors; number 57 showing the beach and boardwalk; numbers 229-238, showing exhibits at agricultural and other shows held in the Casino. Plaintiff's exhibit 256 is a copy of the annual report of the municipal Publicity Bureau of Asbury Park for 1929; Exhibits 265 and 266 are annual reports of the Asbury Park Bureau of Information which is a department of the city government conducted by Miss McConnell as Director. Her testimony (R. 429-432) contains statistical information showing the very great extent and varied nature of the recreational activities in that city. The testimony of Mayor Hetrick (R. 377-390) and of Mr. Burley, Executive Secretary of the Chamber of Commerce (R. 426-8), and of Mr. Gruetzner, Municipal Superintendent, shows the very extensive expenditures and development along the beach front and elsewhere, and the various attractions provided at public expense, solely for recreational purposes, and the extent to which they are used. These improvements include boardwalk, convention hall, theatre, casinos, jetties, piers, bathing facilities, and golf and country club, aggregating more than $50,000,000. in expenditures of public moneys. Some of these expenditures, and similar expenditures by some of the other municipalities, are included in Appendix "C."

Exhibits 40, 41 and 45 illustrate the use of the beaches at Ocean Grove.

Governor Larson testified that shortly after his inauguration (1929) he consulted the Attorney General for advice as to the necessary action to stop this nuisance by compelling the defendant to discontinue the dumping at sea. He caused to be prepared the resolution for that purpose, which was adopted by the legislature. (Pl. Ex. 68.) He had been familiar with the conditions for the past six or seven years and realized that unless this pollution was

stopped it would ruin the beaches as play-grounds. He considers these beaches as one of the greatest assets of the state, which benefit the people from all parts of the state, as well as people from other states and countries, who resort thither for recreation. He discussed the subject in his inaugural message to the legislature in January, 1929. (Pl. Ex. 72, R. 98-101.)

The testimony of 118 witnesses, including the Mayors of fourteen of the municipalities, and twenty-nine other municipal officials, describes the nature and extent of this garbage nuisance in the several municipalities, the amounts expended annually for its removal and its general detrimental effect upon the attractiveness, development, and welfare of the people. It is possible in this brief only to touch upon the principal features of this nuisance.

The effect of this garbage upon the development of the municipalities and the use of the beaches is very harmful (R. 17, 151, 105, 106, 164, 172, 179, 209, 225, 249, 275, 314, 359, 364, 415, 427-8, 477, 481). It depreciates the value of property and interferes with the raising of municipal revenue (R. 505). The garbage and refuse renders it impossible, at times, to bathe or use the beaches (R. 17, 34, 32, 111, 112, 151, 61, 66, 68, 104, 86, 88, 172, 176, 179, 201, 202, 203, 204, 206, 214, 218, 227, 242, 247, 256, 313). When it reaches the beach it is often putrid (R. 18, 29, 145, 184, 189, 191, 203, 207, 252), and is repulsive and disgusting (R. 251). It includes dead animals, which are very offensive and have to be immediately disposed of (R. 108, 29, 115, 103, 88, 102, 164, 191, 214, 216, 222, 336, 344, 360, 364). It leaves gobs of grease which sticks to bathers' feet and bodies (R. 29; 32, 111, 306). In summer the garbage has an objectionable odor which affects the atmosphere for a considerable distance from the beach (R. 108, 151, 152, 67, 80, 103, 158, 143, 148, 215, 216, 245, 249, 321, 337, 341-2, 352, 353, 396, 416-7, 488, 498-9).

A great deal of time and expense is required to clean up and dispose of the garbage which accumulates upon the beaches (R. 27, 112, 235, 236, 102, 103, 156, 251, 321, 322, 323, 360, 392, 424, 485, 498, 520, Appendix "C"). On one occasion in 1927, and on another in 1929, the municipal authorities of Bradley Beach carted off four loads of garbage per hour each day for a week (R. 188-9). Fifty loads of garbage were removed at one time from another section of beach about half mile long (R. 112, 236). On February 7, 1929, they removed 63 truck loads of garbage, bottles, cans and other trash from a similar stretch of beach (R. 116). In April, 1929, it required nine men an entire week to remove one garbage accumulation from the beach at Spring Lake. It contained three full loads of bottles (R. 241).

On one occasion in the summer of 1929, 8 to 12 men, and two trucks each hauling 10 loads a day, of 1½ tons per load, were required for two and one-half days to remove one accumulation of garbage from the beach at Belmar (R. 272-3).

Practically every witness stated that the condition caused by garbage in the water and on the beach was a matter of constant complaint and discussion among the residents and guests in the seashore municipalities. These municipalities comprise a purely recreational community. There are no industries and people come solely for the seashore (R. 174, 175, 179, 200, 201-3, 226-7, 234, 237, 254, 258, 276, 285, 363, 427, 443, 474).

Garbage affects bathing and business conditions, since the shore municipalities and hotels depend upon the beach for their attraction (R. 34, 108, 152).

Surf fishing is greatly interfered with, and there are many fishing clubs along the shore (R. 275-6, 417-18). At times it is impossible to fish because the water is full of garbage (R. 109, 161, 417).

As Appendix "B" shows that many of the articles in the garbage were identified as having come from New York City. Almost every witness has made such identifications.

The garbage comes in whenever the wind is to the northeast or east (R. 33, 66-7, 106, 86, 156, 164).

Menace to Life and Body.

On one occasion between 3,500 and 4,000 bottles were collected from one accumulation of garbage at Bradley Beach (R. 221). On another occasion at Spring Lake si truck loads of bottles were picked up from one garbage accumulation (R. 245).

Bottles in the garbage break in the undertow and on the shore and strew the beach with broken glass (R. 28, 164, 165, 416).

It draws flies of all kinds in great swarms (R. 417).

The garbage contains various articles unmentionable in their nature and highly objectionable to the touch (R. 76-7).

One of the fishermen stepped on a broken bottle while landing his boat and was taken to the hospital where ten stitches were necessary to be taken in his foot (R. 77). Another fisherman testified that the horses which they used on the beach stepped on nails in boards in the garbage and were injured (R. 313).

The use of the beach or waters when the garbage is there involves the risk of stepping on nails in the driftwood or broken glass which comes with the garbage. Many such cases of injury appear in the testimony (R. 312, 149, 28, 221, 245, 261, 314, 319-20, 344, 371, 369, 488). Last summer at Long Branch a gentleman cut his foot severely on a broken bottle in the surf which required seven stitches. Similar accidents have occurred to children

(R. 391). A great many instances of that kind have occurred at Point Pleasant and a good many of such cases have been taken to Dr. Deniston's hospital there; some of them of a serious character (R. 415-16).

The bathing clubs and pavilions maintain first-aid kits and some of them first-aid squads, for the sole purpose of treating people whose feet or body are injured by broken glass, nails and other refuse in the garbage, either floating in the water or stranded on the beach (R. 17, 259, 284, 338). In 1927 the City of Asbury Park was sued by a bather who had received a bad cut on his knee while bathing on one of the beaches owned by the city (R. 509). Some of the bottles in the garbage are labelled "Poison" which still have material in them. The situation is serious, especially if a child happens to pick up such a bottle (R. 106-107).

The presence of the garbage in the water and on the beach produces an unhealthy and a very dangerous condition (R. 314). Bathers must avoid the garbage and debris in the water because it would injure their bodies and would be a menace to their health (R. 328, 363, 164, 196, 422, 351-2). When it has laid in the sun some of it smells terrific and it is dangerous to go on the beach when it is there (R. 499-500). The witness Mosten has gone down to the beach to bathe when it was so nasty that he could not go in without getting the garbage in his mouth. It forms a nasty yellowish foam on the water (R. 68).

Officers of the Seabright Beach Club have had repeated occasion to stop little children, who picked up condruma from the garbage, from blowing them up with their mouths (R. 18). People are afraid to send children to the beach, lest they be poisoned by picking up things (R. 367-8).

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Mrs. Jarden, who has a summer home at Mantoloking, testified that if they had realized the conditions caused

by the garbage and had to do it over again, they would buy further south where the beaches are clean and sanitary for children. "A mother wants a clean, safe, sanitary beach for a child to play on. These conditions are absent at Mantoloking because of broken glass, dirt, debris and disgusting dirt." She described the odor of the garbage as very disagreeable and intolerable. It is terribly offensive. She objects to the rags and mattresses. She fears that the children will get cut and pick up things (R. 352-3).

Tenants complained to Mr. Kirch, who is in the real estate business at Long Branch, that they are afraid to have their children go into the water because of the boxes and nails, garbage "and various other things which I do not care to name at this particular time, which are more offensive. Some of the articles in the garbage are so offensive that I prefer not to name them" (R. 359).

The average mother recognizes the possibility of typhoid fever in floating garbage of this nature and there has been typhoid fever in Red Bank where the witness who gave this testimony lives (R. 331). Some of the materials mixed with the garbage comes from sick rooms and has to be buried or burned (R. 336-337). Children have to be kept away from the beach at times on account of the filth (R. 102, 107). Mrs. Patch described the garbage as very disagreeable, not only because of its presence, but because of the things which the small children pick up from it (R. 204).

The garbage brings in a scum and filth on the ocean consisting of dissolved particles. It is dirty and smells. It is disintegrated vegetable matter, dead animals and rotten meat (R. 215-16). It is highly unsanitary. It has an objectionable odor and it is disagreeable to tread upon. It makes the beaches an unpleasant place for children to play and it is actually unsafe at times to bathe because of the large amount of refuse in the water (R. 351-352).

Mayor Hills of Spring Lake has had many complaints from families concerning their children and women. They were much alarmed and afraid their children would contract disease from the garbage (R. 239). Mr. Ward has to keep his own children away from the beach when the garbage is there. The doctor ordered it because he did not want the children to run the risk of contracting disease or gain an infection from the garbage (R. 415-16). Mrs. Rhodes will not permit her children to go to the beach until she ascertains what the garbage conditions are. That is the general practice in the community (R. 363).

Dr. James A. Fisher, of Asbury Park, an eye, ear, nose and throat specialist, testified that he was familiar with the conditions of garbage on the beach and believes they play a part in his professional work. He has prepared a summary of the diseases of the ear and the sinuses for the months of June, July and August to see if there has been an increase in those diseases during those months. In 1928 he had four cases of furunculosi; in 1929 he had twelve cases. In 1928 he had one case of external otitis, which is a swelling and inflammation of the ear canal. In 1929 he had eleven such cases. In 1928 he had eleven cases of middle ear infection, including the reddening of the eardrum, which required the drum to be opened. In 1929 he had fourteen such cases. In 1928 he had eight sinus infection cases. In 1929 he had eleven such cases. In each of those cases bathers came in with the remark that they had gotten something from the sea bathing. Pure sea water has a high chlorine content and is quite antiseptic; infection is therefore quite contrary to the natural condition of sea water. The cases which he mentions were only those that appeared in his records under A, B, C and D. His records were too numerous to complete the investigation for all the letters of the alphabet in his records (R. 84-86).

The Hotels.

The effect of the garbage upon the hotel business is described by the proprietors or managers of some of the important hotels (Penna, R. 113-5; Schock, R. 126-7; Hillig, R. 306-8; Hayes, R. 250; Stubbs, R. 251-2; Duffield (President, Asbury Park Hotelmen's Association) R. 421-2; Butcher, R. 422-3; McElroy, R-424; Van Ness, R. 429; Kinmouth, R. 440-5; Manneshuer, R. 487-8).

This testimony gives considerable information regarding the nature and extent of the hotel business and the number and character of the guests who come to the seashore for recreational purposes during the summer. It shows that the sole attraction of the municipalities and the hotels is the beach-front and the opportunity for bathing, fishing and other recreation to be found there. It also shows that the garbage conditions are the cause of constant complaint and dissatisfaction among the guests particularly among those whose circumstances permit only a short vacation. If the garbage on the beach or in the water prevents them from bathing for two or three days, as frequently occurs, the major part of their vacation is ruined. This applies to guests who come for a week, but these circumstances are particularly unfortunate for those who come on day excursions or for week-ends and happen to find garbage conditions existing at the time. This testimony also shows that the presence of garbage in the water and on the beach has a direct effect upon the volume of the hotel business and the satisfaction of the guests. Instances are mentioned where guests were so disappointed by the garbage on the beach that they packed up their bags and went elsewhere to spend the remainder of their vacation (R. 207). Instances appear where guests stopped coming to these resorts entirely because of their disgust with the garbage condition (R. 250).

At the Monterey Hotel at Asbury Park in July, 1928, a group of seven guests who had been accustomed previously to stay for protracted periods, told the manager that the beach was a mess, that they could not put up with it, and they left (R. 443-444).

The president of the Asbury Park Hotelmen's Association stated that the garbage condition is the most discouraging thing which the hotel men have to deal with in their business (R. 422). The Asbury Park hotels have a general advertising program to attract people from distant places (R. 424).

Defendant's Proof.

As the Special Master observed (Rep. p. 50), plaintiff's testimony showing that the garbage drifted to the plaintiff's shore, its affect on navigation and fishing in plaintiff's waters, (within three miles of the shore) and the shore, was not contradicted by any evidence offered by defendant.

There is therefore no dispute concerning these facts, or as to quantity of garbage dumped by defendant at sea or the location of the dumping grounds, as designated by the Supervisor of the harbor at various distances, according to season, up to 20 miles, southeast by east of Scotlant Lightship, (Pl. Exs. 321-325).

That Lightship and the various ship channels at the mouth of New York Harbor and off the coast of New Jersey, are shown on Appendix "A" annexed to this brief. The locations of several of the dumping grounds are shown on Pl. Exhibit 205 (R. 294-5).

The fact that defendant's garbage reached plaintiff's shores was constantly called to its attention, without denial, during the negotiations of Governors Silzer, Moore and Larson, in the correspondence contained in Exhibits 298 and 299, and in Exhibits 257 and 258 there are fre-

quent admissions of the fact by official representatives of defendant. In August, 1925, Mr. Taylor, Street Cleaning Comissioner of defendant, came down to the Seabright Beach Club, in answer to complaints from Smack. He admitted that the plaintiff's garbage littered the plaintiff's beaches, and said "I am going to ask you, I am going to beg you to lay off me. You are making my life a hell. If you will, within one year we will have completed all our plans for incineration and we will dispose of all of New York City's garbage in that way." (R. 19).

At the hearings defendant undertook to dispose of plaintiff's proof by the testimony of three witnesses confined to three specific occasions, all in the winter time (January 30, February 1, and February 29, 1930) who attempted to show that the garbage dumped at sea was so beaten up by the wind and waves that it either sank or was dissipated. (Gainard, R. 547-57; Lawrence, R. 581-9; Bergsten, R. 614-621). The testimony of these witnesses is in entire accord with that of Hans Smack, and the fishermen respecting the action of garbage after being dumped at sea and the manner in which it floats before the wind. On their first inspection they drifted with the garbage for a distance of about ten miles until they were required to discontinue on account of a snow storm (R. 549). On that occasion the garbage was dumped at a distance of twenty miles, and drifted to within fourteen miles, of the Jersey shore before they left. (R. 550). On the second occasion they put bottles overboard in the garbage to test the floating but did not gather them up because "they were floating to the Jersey shore." (R. 557). Since these inspections were made at night and one, at least, during a snow storm, it is not strange that the garbage disappeared from their view.

Summary of Facts.

It is difficult to adequately describe the nature and extent of the development of the plaintiff's seashore resorts or the extent to which they are used for bathing, recreation and other useful purposes. There is probably no place in the world where people resort in such large numbers to the seashore for the primary purpose of beach and bathing pleasure as in New Jersey, and the resorts along the section in question are second to none in their aggregate importance, value and extent of patronage.

The exhibits and the testimony show that these shore municipalities, which adjoin each other and stretch along the shore for a distance of seventy miles, constitute the greatest park and playground in the world. They serve the people of the adjacent municipalities, the people of the entire state, and people from all parts of the United States and some from abroad. In addition to the general use for recreational purposes which plaintiff undertakes to preserve, there has developed in the twenty-nine municipalities involved property values aggregating more than one hundred thirty-nine and one-half million dollars (Plaintiff's Exhibit 69), which depend for their maintenance upon the preservation of these recreational advantages.

Those municipalities have a permanent population of over 160,000 people, whose support and welfare depend upon these recreational enterprises. In addition to that, there are large increases in the population in the summer of people who operate summer hotels, shore-front concessions and business enterprises and those who assist in the general work of lodging, feeding and entertaining the many thousands of guests or residents who come in the summer.

The record shows that here is a large and important industry, one of the most valuable in the plaintiff's state,

which suffers constantly in annoyance and expense from the public nuisance caused by the defendant's dumping of garbage at sea. It retards the development and growth of the seashore communities; depreciates the value of real property; reduces and impairs the development of commercial enterprises; and retards the general prosperity; impairs and at times destroys the use and enjoyment of the advantages of valuable public beach front and of the shore waters for bathing purposes; creates a menace to life and limb from nails in boards, floating wood and broken glass brought in with the garbage; exposes the frequenters of the beach to infection and disease from decayed and putrid vegetable and animal matter and from disgusting, repulsive and unmentionable unsanitary articles therein contained, and the people in public places and in their houses to the annoyance of foul odors emanating from such decayed matter; incurs what amounts in the aggregate to a very large annual expense for cleaning the public and private beaches and removing the offensive material from streets and public places; and exposes the people about the beaches, streets and other public places and in their houses to infections and disease carried by the vast swarms of flies which feed and breed in the putrid masses of the garbage. No essential fact remains to complete a powerful indictment against the defendant for creating a public nuisance within the territorial limits of the plaintiff by reason of the dumping of its garbage at sea.

Public Nuisance Proven.

The Special Master's conclusions that the conditions shown by plaintiff's uncontradicted testimony amount to a public nuisance (Rep. 53), and that plaintiff has the right to bring this suit and to have injunctive relief, are amply sustained by all the authorities. 7 *Bacon's*

Abr., (Nuisance) pp. 223, 226-230, 233; 21 *Am. & Eng. Ency, L.* (2d ed.) pp. 682-3, 686, 711; 1 *Wood on Nuisances* (3 ed.) Secs. 14, 19-20; *Gould on Waters* (3 ed.) Secs. 21, 92-3; 1 *Spelling on Injunction*, Secs. 373-4; *Northwestern Fertilizing Co.*, v. *Hyde Park*, 97 U. S. 659; *Georgia* v. *Tenn. Copper Co.*, 206 U. S. 230, 237, 239; *Kuehn* v. *Milwaukee*, 92 *Wis.* 263, 18 L. R. A. 553, 554-6; *Block* v. *Baltimore*, 149 Md. 39, 129 Atl. Rep. 887, 891-4; *Huffmire* v. *Brooklyn*, 162 N. Y. 564, 57 N. E. 176, 177-8; *Peck* v. *Michigan City*, 49 N. E. 800, 801; *Kansas* v. *Concordia*, 96 Pac. 487, 20 L. R. A. (N. S.) 1050, 1055-7; *Board of Health* v. *Lederer*, 52 N. J. Eq. 675, 682-3; *Mugler* v. *Kansas*, 123 U. S. 623, 673; *Baltimore &c. R. R. Co.* v. *Fifth Baptist Church*, 108 U. S. 317; *Attorney General* v. *Jamaica Pond Acqueduct Corp.*, 133 Mass., 363-364.

(3)

Compliance by the defendant with the provisions of the Act of Congress of June 29, 1888 (29 Stat. 209) as amended, and the permits to dump garbage in the Atlantic Ocean at a distance in excess of one marine league from the shores of New Jersey issued by the Supervisor of the Harbor of New York in accordance with said Act, do not relieve the defendant from the effect of the public nuisance resulting from and created by said dumping.

Under this heading defendant has grouped its exceptions 44 to 50, inclusive, which challenge the Master's findings that the permits of the Supervisor of the Harbor do not authorize or justify the defendant to commit a public nuisance in the waters or on the shores of the plaintiff.

Defendant claims the right to dump its garbage and refuse at sea by virtue of permits issued by the Super-

visor of the Harbor of New York, under authority of the following Act of Congress:

"The placing, discharging, or depositing, by any process or in any manner, of refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind, other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the tidal waters of the harbor of New York, or its adjacent or tributary waters or in those of Long Island Sound, within the limits which shall be prescribed by the supervisor of the harbor, is hereby strictly forbidden, and every such act is made a misdemeanor, and every person engaged in or who shall aid, abet, authorize, or instigate a violation of this section, shall, upon conviction, be punishable by fine or imprisonment, or both, such fine to be not less than $250 nor more than $2,500, and the imprisonment to be not less than thirty days nor more than one year, either or both united, as the judge before whom conviction is obtained shall decide, one half of said fine to be paid to the person or persons giving information which shall lead to conviction of this misdemeanor (June 29, 1888, c. 496, Sec. 1, 25 Stat. 209)" (*U. S. C. A. Title* 33, *Sec.* 441, *p.* 455).

"In all cases of receiving on board of any scows or boats such forbidden matter or substance as described in section 441 of this chapter, the owner or master, or person acting in such capacity on board of such scows or boats, before proceeding to take or tow the same to the place of deposit, shall apply for and obtain from the supervisor of the harbor appointed as provided in section 451 of this chapter, a permit defining the precise limits within which the discharge of such scows or boats may be made; and it shall not be lawful for the owner or master, or person acting in such capacity, of any tug or towboat to tow or move any scow or boat so loaded with such forbidden matter until such permit shall have been obtained and every person violating the foregoing provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than

$1,000, nor less than $500, and in addition thereto the master of any tug or towboat so offending shall have his license revoked, or suspended for a term to be fixed by the judge before whom tried and convicted. (May 28, 1908, c. 212, Sec. 8, 35 Stat. 426)" (*U. S. C. A., Title* 33, *Sec.* 443, *p.* 458).

The only authority of the federal government is to protect navigation.

Wisconsin v. *Illinois*, 278 U. S. 367, 418.

The above-quoted act does not confer plenary power to authorize defendant to dump its garbage and refuse at sea. Such are the uniform decisions of the courts in construing similar acts, such as the Rivers and Harbor act of 1899, under which the Secretary of War issues permits for structures in or over navigable waters. *Cummings* v. *Chicago*, 188 U. S. 410; *Montgomery* v. *Portland*, 190 U. S. 89; *Attorney General* v. *Hudson County Water Co.*, 76 N. J. Eq. 543; 22 *Op. Atty. Gen'l*, 332; *Cobb* v. *Lincoln Park*, 202 Ill. 427; *International Bridge Co.* v. *N. Y.*, 254 U. S. 126.

There is no difference in principle in this respect, between the River and Harbor Act involved in the authorities above cited, and the act to prevent obstructive and injurious deposits in New York Harbor and adjacent waters above quoted.

A statute which purported to confer authority to dump defendant's garbage at sea so as to affect plaintiff's property would be in derogation of the common law, and therefore must be strictly construed. *Attorney General* v. *Hudson County Water Co.*, 76 N. J. Eq. 543, 552. The above statute so construed does not give any such authority. Moreover, that act does not appear to confer upon the Supervisor of the Harbor authority even to permit defendant to dump garbage in the places used for that purpose. It authorizes him to prescribe limits within which dumping of material is forbidden (Sec. 441). Sec-

tion 443 implies, but does not expressly authorize, the issuance of permits, before scows, of forbidden matter can be moved, defining "the precise limits within which the discharge of such scows or boats may be made." There is no evidence in this case showing what, if any, "precise limits" were defined in the permits for any of defendant's scows. The various reports of the Supervisor (Exhibits 321-334) prescribe the direction and distance "southeast by east from Scotland Lightship" for the dumping of scows containing garbage or other materials, but the statute says the permit *itself*, in each instance, shall define those "precise limits." It is, therefore, impossible on this record to determine even the validity of the permits, or permission to use the dumping grounds which defendant does use.

That act is distinctly limited in its application to "the tidal waters of the harbor of New York, or its adjacent or tributary waters, or in those of Long Island Sound." Outside of those limits another statute applies, namely section 407 U. S. Code, Title 33 (30 Stat. 1152, Sec. 13), which contains similar prohibitions with authority to the Secretary of War, "whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby," to permit the deposit of material in the navigable waters of the United States, upon such conditions as he may prescribe. It does not appear that the Secretary of War ever issued any permit to defendant. On the contrary defendant claims that its permits were all issued by the Supervisor of the Harbor, and Secretary of War Weeks in a letter dated September 10, 1923, advised Governor Silzer that "no permits therefor have been issued by the department" (Pl. Ex. 298).

There is a question whether the waters twenty miles southeast by east of Scotland Lightship are "adjacent" waters of the harbor of New York. Exhibit 205, described at pages 293-6, shows that the dumping places

observed by Smack were located approximately 11½ miles off North Long Branch and approximately 19¼ miles off Asbury Park. The dumping grounds most frequently used, were off the New Jersey shore between Deal Beach and North Asbury Park. It is therefore a question whether the dumping grounds used by the defendant are within the limits described in the act of 1888. *U. S.* v. *Sadie*, 41 Fed. 396; *City* v. *Leland*, 45 Fed. 380.

The Special Master points out (R. 46) that these dumping grounds are not within the limits of the definition of the Harbor of New York as prescribed by the Secretary of the Treasury, under the Act of February 2, 1905 (28 Stat. 672), as "a line from Navesink Lighthouse to Scotland Light, thence to Whistling Buoy in Gedney's Channel, and thence to Rockaway Point (see Plaintiff's Exhibit 205).

However, we are here confronted with the converse of the question discussed under Point 1, respecting jurisdiction. Defendant claims authority under the permit issued pursuant to an act of Congress, but denies jurisdiction of the Court over the place to which it claims the permit apply. In any event it is plain that the Master's conclusion is correct (R. 49) that possession of, and compliance with, the permits issued by the Supervisor of the Harbor furnish no defense to relieve defendant from the effect of a public nuisance resulting from its action thereunder. *Joyce on Nuisances*, Sec. 284; *Brayton* v. *Fall River*, 113 Mass. 218; *Franklin Wharf* v. *Portland*, 57 Me. 446; *Huffmire* v. *Brooklyn*, and *Block* v. *Maryland*, cited above.

(4)

Such garbage and refuse as reaches the plaintiff's shores from the dumpings by coastwise and other vessels and from other sources is negligible in comparison with that dumped by defendant and reaching plaintiff's shores and constitutes no defense to plaintiff's complaint.

Under this heading defendant has grouped its exceptions 51 to 69, inclusive, which challenge the Master's findings that whatever garbage and refuse reaches plaintiff's shores from passing vessels and other causes and other dumpings are negligible in comparison with that constantly being dumped by defendant and carried by winds and waves to and upon plaintiff's shores, and the Master's failure and refusal to find as requested respecting sewage from Long Branch and Asbury Park.

Defendant contends that the garbage dumped by defendant was so mixed up with condemned food stuff and garbage dumped by passing ships that it was impossible to tell the source from which the garbage on the beaches comes. Defendant's three witnesses, Gainard, Lawrence and Bergsten testified to the number of passing vessels and the alleged accumulation of garbage on the decks, amounting, according to Gainard, sometimes to 50 tons, accumulated in ten to fifteen days in port (R. 560), occupying a space of 50 cu. ft. to the ton, or 2,500 cubic feet of garbage and refuse piled on the deck of a vessel (R. 561). This would equal 100 lbs. of garbage per day per man for ten days for a crew of 100 men. Neither Lawrence nor Bergsten were willing to go that far, but Lawrence thought that he had dumped as much as from 25 to 30 tons of accumulated garbage at one time (R. 591). The rebuttal evidence shows that this testimony is incredible. Such dumping is in violation of the Act of 1888, and of the regulations issued by the Supervisor of the Harbor (Exhibits 342-4) as shown by his testimony

(R. 628). He (Captain Anderson) testified that in the enforcement of the law he employs two patrol boats and has the co-operation of the Custom Guards, Prohibition Officers and Coast Guards (R. 629); that if it were the ordinary practice of vessels to accumulate garbage in port and dump it at sea in the manner and quantities testified by Gainard, Lawrence and Bergsten, he or his inspectors would have been likely to have discovered some instances of it. It could not continually escape their notice. An occasional violation might not be detected but a prevailing practice could not escape detection.

During the hearings counsel for defendant attempted to obtain on cross examination of fishermen who testified for plaintiff admissions that passing vessels dumped garbage into the sea. A number of those witnesses admitted that small quantities were so dumped but all of them testified that there was too much garbage in the sea to have come from passing vessels (R. 45, 130), since vessels threw out only a very small amount, like a bucket-full, at a time (R. 131-40). In reply to such a question on cross examination, Mr. Bailey, who had been a coastguard officer for 28 years, said: "If the garbage came from the passing vessels it would come on a southeast wind, as well as on a north or northeast wind, but it does not come that way. It comes only on a east or northeast wind" (R. 132). In answer to a similar question, Mr. Howland replied that it was impossible for the garbage to have come from passing ships. He could see no reason why garbage from the passing ships would blow ashore, while garbage from the defendant's dump would go in the other direction, on the same wind (R. 29). One of the fishermen said: "I have seen quantities larger than the steamer could carry" (R. 40).

Other rebuttal of defendant's testimony came from two of plaintiff's witnesses. William Park, Superintendent of the Clyde and Mallory Lines, has been engaged in

coastwise shipping as captain and otherwise for more than thirty years. He operates 21 ships out of the port of New York having three times as many sailings as any other line. The only garbage accumulated in port that is dumped at sea is that of the last half day before sailing and amounts to perhaps an ash can full. Garbage or rubbish produced or cleaned from the ships while in port is taken to the piers and carted away by a garbage company. There is no room on a vessel to accumulate and store the quantity of garbage and refuse Gainard and his associates testified to. Ships dispose of their garbage at sea little by little as it is produced and everything that is edible is immediately disposed of by gulls or fish. He has never seen vessels dump any quantity of garbage at sea. Vessels do not stay in port ten days, if profitably operated. A crew of thirty men will produce in two days four or five cans of garbage (R. 641-5).

Harry P. Snow is chief officer of the steamship "George Washington" and has sailed in the coastal service for thirty years. During the lay-over of a vessel in port with crews of from 30 to 90 men, they accumulate not more than 2 to 3 10-gallon cans of garbage. It is dumped at sea after they leave port and is immediately consumed by gulls. He never saw any quantity of garbage dumped at sea by any vessel. He has sailed through the garbage areas of defendant's dumping grounds at sea and has seen quantities of garbage which could not have come from passing vessels. He has never seen accumulations of garbage on the decks of vessels, as testified to by Gainard and his associates. He made the significant statement that "No good sailor would cover his deck with slippery, slimy garbage (R. 645-9).

Sewer Pollution.

Defendant also alleges, and attempted to prove, that the waters and beaches at Long Branch and Asbury Park were polluted by insufficiently treated and unsanitary sewage from those cities. With respect to Long Branch it subpoenaed the Director and records of plaintiff's Department of Health. The records consisted of defendant's Exhibit 9, which included three resolutions, all adopted September 14, 1926, relating to the sewer system of a private company called "The Long Branch Sewer Company." Resolution (a) accuses the company of polluting the waters of the ocean by insufficiently treated sewage, and calls upon it to remedy the condition prior to June 15, 1927; resolutions (b) and (c) show that thereupon the company applied to the Department of Health for permission to make certain extensions and changes which were approved by the Department as providing "a sewage treatment plant satisfactory to this Department." Defendant also produced as its Exhibit No. 10 a report made in 1928 by Messrs. Watson, Pugh, and Lendall, Consulting Engineers of New York City, for the City of Long Branch, for the purpose of valuing of the sewer system of the Long Branch Sewer Company, the purchase of which the city then contemplated. Although that report purports to refer to criticism of the sewer system by "the state authorities" without mention of time and nature, the engineers recommended the purchase of the system "at the price asked by the company." (Defendant's Exhibit No. 10, pp. 1, 2.)

There is no other evidence of any deficiency in, or pollution from, the Long Branch Sewer System.

With respect to the Asbury Park sewer, two of defendant's witnesses testified that on March 11, 1930, they examined the outlet of that sewer, located in the ocean at a point between 1,000 and 1,200 feet from the shore and observed particles of decomposed fecal matter

and pieces of orange peel, celery, toilet paper and other objects floating in the water. They did not say this matter came from the sewer (R. 612-14). In rebuttal the Superintendent of the Asbury Park Sewer System described the method of sewer treatment, and stated that no fecal or solid matter goes into the sea and that the effluent is not of the character that will pollute the water. He further testified that for a short period each winter they open the valve for the purpose of flushing out the sewer system and that happened to be the condition existing on March 19, 1930, when defendant's witnesses examined the sewer outlet (R. 650-3).

Defendant offered as its Exhibit No. 11 and bill of complaint filed by the plaintiff's Department of Health against the City of Asbury Park on November 10, 1930, alleging pollution of the shore waters by the sewer system of that city "due to the inadequate, improper and insufficient *capacity* and *unit design* of said sewage treatment works," and praying for an injunction. These allegations were denied in the city's answer filed December 30, 1930. In due course that case will come to trial on the merits. Whether the Department of Health succeeds or fails in its attempt to prove the allegations of the complaint is not important in this case for the reasons: first, if it succeeds the occasion merely serves to illustrate the indiscriminate diligence of plaintiff in the protection of its beaches, and second, the cause of action alleged in that complaint arose after the record in this case was completed, and if those allegations are proven they could not have any effect upon the conditions of garbage pollution alleged and proven.

Other Testimony of Defendant.

Defendant produced the records of the office of the Supervisor of the Port showing that seven different companies obtained permits for dumping mud, cellar dirt and excavated rock at points from four to six miles southeast of Scotland Lightship. The proof does not show that any of these permits were ever used or that any such material was ever actually dumped, but that is immaterial because none of those permits authorized the dumping of garbage or other floating material, of which plaintiff complains (R. 546-7).

Another witness of defendant testified to the location of certain private docks in New York City which he had inspected between March 3 and 12, 1930, and described certain scows by name and certain classes of material, consisting in part of garbage and refuse and dirt, with which the scows were being loaded (R. 595-602). No testimony was offered that any of these scows had permits or were dumped at sea, or where they were dumped, and none of the names of those scows are included in those given by plaintiff's witnesses, who, on the contrary, distinctly identified, as belonging to the Department of Street Cleaning of the City of New York, by the initials "D.S.C." thereon, the scows which they testified were dumping garbage off the plaintiff's coast. If all of the scows mentioned in this testimony had dumped their material off plaintiff's coast the amount of their contents would have been infinitesimal and inconsequential as compared with the dumping by defendant of 192,000 tons per month in summer or of an average of 2833 tons of garbage and refuse each and every working day throughout the year.

Defendant's exception No. 57 refers to the failure and refusal of the Special Master to find, as requested, that Brooklyn Navy Yard scow containing refuse and garbage also dumped at sea at the regular dumping

points at which defendant's garbage is dumped. A score or more of plaintiff's witnesses saw defendant's scows dump garbage at sea, but they never saw a Navy Yard scow dump any material, and defendant produced no evidence of any such dumping.

Defendant's contention that a similar nuisance is being created by passing ships, private contractors, or the Brooklyn Navy Yard is not a valid defense. 21 *Am. & Eng. Ency. L.* (2d ed.) 690; *Rowland* v. *N. Y. Stable Manure Co.*, 88 N. J. Eq. 168, 175.

The Master was therefore justified in his conclusion (Rep. p. 36) that whatever garbage and refuse reached plaintiff's shores from these other sources are negligible in comparison with that constantly being dumped by the defendant, and frequently carried by wind and waves from the dumping places to and upon plaintiff's shores.

(5)

Particular exceptions to the Special Master's report and to his failure to find facts and make conclusions of law as requested by defendant and in support of its contention that all of the evidence, a case for equitable relief in favor of the plaintiff, was not made out.

Under this heading defendant has grouped its exceptions 70 to 92 inclusive, which challenge the Master's findings respecting the construction and operation of incinerators for the disposal of garbage, his finding that the defendant had delayed the adoption of a proper method for that purpose, and other miscellaneous findings or failures to refusals to find as requested on certain minor points.

The finding of the Master that the evidence does not show the cause of apparent delay by the defendant in adopting and putting in operation the incinerating system

and that this delay has been unreasonably long (Rep. p. 30), which is the basis of defendant's exceptions 70 and 71, is amply justified by the record, as appears from the discussion under the heading "Official Objections" in Point (2) of this brief. In spite of constant complaints from plaintiff's officials and municipalities; in spite of the numerous admonitions of the Secretary of War and the Supervisor of the Harbor; and in spite of the numerous promises of defendant's officials, all unfulfilled, defendant's Exhibit 12, and the testimony of defendant's witnesses, show that, in spite of the incinerators which defendant claims to have constructed and put in operation, the amount of garbage dumped at sea in the year 1929 was greater than that of the three previous years.

After a number of years of experience with defendant's promises, Captain Anderson, Supervisor of the Harbor, in a published statement of July, 1930, said:

> "Official statement has been made to the Supervisor that this desirable situation (the discontinuance of dumping at sea) would be reached by the end of 1930.
>
> Experience in the past indicates that these sanguine estimates are not to be taken too literally, however." *(U. S. Naval Institute Proceedings Vol. No. 56, No. 7, Whole No. 329, July, 1930, P. 577.)*

Defendant's exception No. 91 challenges the Master's failure and refusal to conclude as a matter of law, as requested, that the plaintiff has failed to prove facts sufficient to constitute a cause of action in equity for the relief demanded in the complaint or for any relief whatever in equity.

On the argument before the Master defendant contended that even though it was a city, rather than a state, it was entitled to the benefit of the rule stated in *Missouri* v. *Illinois*, 200 U. S. 496 and *New York* v. *New Jersey*, 256 U. S. 296, that in order to control the conduct of one

state at the suit of another, the injury must be of serious magnitude and clearly proven. Plaintiff contended, on the contrary, that the different rule established in *Georgia v. Tenn. Copper Co.*, 206 U. S. 230, applied, namely:

> (p. 237) "Some peculiarities necessarily mark a suit of this kind. If the state has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be."
>
> (p. 238) "This court has not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains, that it would have in deciding between two subjects of a single political power."

Defendant has not the status or sovereignty of a state, but is a citizen of the state of New York, *Wisconsin* v. *Duluth*, 96 U. S. 379; *Trenton* v. *New Jersey*, 262 U. S. 182, 189; *Metropolitan R. R. Co.* v. *District of Columbia*, 132 U. S. 1; *Cincinnati* v. *First Presbyterian Church*, 8 Hammond 298; 1 *Sharswoods Bl. Com.* 191, Note 6.

While we think this contention is correct we are also convinced that the Master was correct in his conclusion (Rep. p. 57) that there has not only been an invasion of serious magnitude of plaintiff's rights extending through some years, but it is continuing and is threatened for an indefinite period. For these reasons we think the Master was also correct in failing and refusing to conclude, as requested, that defendant is entitled to a dismissal of the complaint, with costs. (Defendant's exception No. 92.)

(6)

Recommendations For Decree.

Under this heading defendant has grouped its exceptions 93 and 94, which challenge, respectively, recommendations numbered 1 and 2 of the Master's report (pp. 59, 60).

With respect to recommendation number 1: The facts adduced by the proof, and the decisions applicable thereto, which have already been fully discussed, justify the Master's recommendations of a decree for injunction in accordance with the prayer of the complaint. That recommendation is qualified by the suggestion that the injunction should be delayed a reasonable time to enable defendant to carry into effect some plan to dispose of its garbage and refuse otherwise than by dumping it at sea. We call to the court's attention the fact that previous promises of relief have been totally disregarded; that the consequences of dumping garbage at sea were pointed out to defendant in 1907 (Parsons-Hering-Whinnery report, Pl. Exhibit 346), and that the committee of defendant's officials who reported to Mayor Hylan in 1921 (Exhibit 347) expressly stated:

> "It is known that the Federal authorities quietly resent, if they do not openly object to it, and there is always the possibility of objections from other communities which have in the past claimed that they have been injured by the practice. *When these objections become sufficiently strong it may be that New York will find itself so unprepared that it will be unable to quickly introduce a more satisfactory form of disposal.*" (Italics ours.)

It will be remembered that when Dr. Copeland and Commissioner McStay originally solicited permits from the Supervisor of the Harbor, in 1918, for permission to dump at sea, they stated that it was a "temporary disposition of garbage"—"a temporary expedient to bridge over an emergency" and the permission was requested only "until the 15th of September," 1918.

In view of these circumstances we submit that if any indulgence of the court is necessary it should be limited to the *barest necessity*, having in mind the following ob-

servation of Mr. Justice Holmes in the decision of this court in *Wisconsin* v. *Illinois*, 281 U. S. 179, 197:

> "They must find out a way at their peril. We have only to consider what is possible if the state of Illinois devotes all of its powers to dealing with an exigency to the magnitude of which it seems not yet to have fully awaked. It can base no defenses upon difficulties that it has itself created."

Respecting the second recommendation of the Special Master that the case be referred to a Master for findings of fact as to what reasonable time is necessary for the erection and operation of incinerators: Mr. Samuel A. Greeley, of the Chicago Engineering firm of Pearse, Greeley and Hanson, whose ample qualifications are disclosed, particularly with regard to the collection and disposal of garbage in New York City, at pages 653-6 of the record, and who the master regarded as a sanitary engineer of recognized experience and ability, with practical knowledge of the methods of the disposal of garbage (Rep. p. 29), and who was the co-author with Rudolph Hering in the publication of a standard authority on this particular subject, entitled "Collection and Disposal of Municipal Refuse" (R. 655), testified, without contradiction, that incinerating plants, such as the defendant has already erected, could be constructed and put into operation within a period of one year and that any number of plants could be simultaneously erected within that time (R. 661).

As the Master points out, Dr. Schroeder, Commissioner of Sanitation of defendant, testified that he had formulated a policy for the complete incineration of all of defendant's garbage and rubbish and that a program for its execution was submitted to the Mayor on December 23, 1929 (R. 592-3), but the record does not show that any action was taken on that report or the reason for delay in putting it into execution (Master's Rep. p. 29-30). Defendant claims that it has ample

powers of condemnation for the acquisition of sites for the erection of incinerating plants. This is a finding of the Master (Rep. p. 30), to which defendant has taken no exception. In view of these facts the only question left for a Master to consider on re-reference is the period of time necessary for the acquisition of land. This would seem to be a question that could be answered, within reasonable limits, by anyone familiar with the procedure of eminent domain in the State of New York.

Costs.

The decree of the court should carry costs in favor of plaintiff.

Conclusion.

Plaintiff asks for a injunction perpetually restraining and enjoining defendant, its contractors, officers, agents and employees, and all other persons acting or claiming or assuming to act under its authority, from dumping, or procuring or suffering to be dumped, any garbage or refuse, or other noxious, offensive or injurious matter, into the ocean or other waters of the United States off the coast of New Jersey, and from otherwise defiling or polluting said waters and the beaches of plaintiff, or procuring them to be defiled or polluted as aforesaid.

Respectfully submitted,

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Solicitors of Plaintiff.

APRIL 30, 1931.

APPENDIX "B."

List of articles mentioned in the testimony as included in garbage dumped at sea and appearing on the New Jersey beaches, with page references to the stenographer's record.

(Note: Letters "N. Y." denote identification as having come from New York City.)

ADVERTISEMENTS:

211 N. Y., 269 N. Y., 495 N. Y., 531 N. Y.

ANIMALS:

15, 43, 45, 51, 53, 56, 125, 130, 134, 134, 146, 151, 164, 182, 191, 227, 228, 245, 261, 308, 310, 311, 318 322, 327, 336, 339, 341, 357, 360, 363, 366, 395, 403, 414, 434, 479, 484, 487, 499, 502

APPLES:

10, 67, 71, 76, 87, 102, 142, 143, 145, 146, 157, 162, 176, 178, 187, 188, 245, 392, 454, 529

ARTICLES (miscellaneous):

32 N. Y., 44 N. Y., 114, 134 N. Y., 141, 168 N. Y., 177 N. Y., 184 N. Y., 187 N. Y., 188 N. Y., 191 N. Y., 195, 198 N. Y., 199 N. Y., 206, 211, 222, 234 N. Y., 239 N. Y., 222 N. Y., 249, 258 N. Y., 267, 338 N. Y., 340 N. Y., 352 N. Y., 356 N. Y., 359 N. Y., 361 N. Y., 368 N. Y., 372 N. Y., 395 N. Y., 404 N. Y., 436 N. Y., 488 N. Y., 488 N. Y., 499 N. Y., 501 N. Y., 523 N. Y.

ASPARAGUS:

10

AUTO PARTS:

46, 77, 78, 125

Balls:
10, 37 N. Y., 481

Bananas:
31, 32, 48, 51, 56, 67, 70, 71, 76, 79, 80, 82, 86, 87, 102, 103, 114, 125, 126, 142, 143, 146, 146, 147, 148, 157, 162, 178, 198, 202, 205, 216, 218, 220, 223, 224, 238, 245, 267, 270, 270, 283, 327, 354, 355, 356, 358, 367, 394, 397, 399, 408, 454, 529, 529

Barrels:
70, 71, 75, 86, 118, 125 N. Y., 140 N. Y., 142, 246 N. Y., 278, 310, 311, 311, 312, 315 N. Y., 316, 318, 322, 356, 356, 391, 392, 394, 397 N. Y., 529

Baskets:
145, 275, 487, 499.

Beans:
134, 157

Bed Springs:
31, 32, 32, 74, 102, 112, 125, 238, 263, 283, 367, 403

Beds:
31, 73, 125, 145, 238

Bedding:
51, 145, 271

Beef:
358, 386

Beets:
10, 134, 134, 140, 145, 157, 245, 529

Bill of Fare (see menu).

Billheads:
103 N. Y., 104 N. Y., 138 N. Y., 160 N. Y., 161 N. Y., 187 N. Y., 187 N. Y., 206 N. Y., 207 N. Y., 219 N. Y., 268 N. Y., 289 N. Y., 290 N. Y., 324 N. Y., 354 N. Y., 355 N. Y., 404 N. Y., 420 N. Y., 456 N. Y., 477 506 N. Y.

Boards (see sticks).

Boat:
223

Bones:
172

Books:
140

Boots:
125

Bottle Tops:
243 N. Y., 291

Bottles:
17, 27, 31, 43, 51, 53, 54, 54, 56, 60, 60, 65, 67, 70, 73, 77, 80, 82, 86, 86, 81, 102, 103, 103, 106, 106 N. Y., 107, 110, 114, 115, 116, 118, 125, 125, 126, 148, 157, 164, 167, 168 N. Y., 169, 172, 177, 178, 178, 178, 182, 187 N. Y., 188 N. Y., 191 N. Y., 195 N. Y., 208, 212, 218 N. Y., 220, 220, 221 N. Y., 228, 235, 238, 241, 242, 245, 259, 260, 261, 262, 262, 267, 271, 272, 274, 275 N. Y., 281, 283, 284, 314, 318, 318, 319, 321, 322, 328, 336 N. Y., 338, 350, 351, 353, 354, 354 N. Y.,

355 N. Y., 355, 358, 366, 367, 371, 372 N. Y., 386 N. Y., 407, 413, 415, 438, 439, 454, 462, 487, 490 N. Y., 495 N. Y., 499, 499, 500, 501 N. Y., 503, 508, 508, 523, 523, 526, 529, 530

Boxboard:
319

Boxes and Crates:
10, 19 N. Y., 27 N. Y., 31, 32, 32 N. Y., 33, 33 N. Y., 36 N. Y., 44, 45, 51 N. Y., 56, 56 N. Y., 60, 60 N. Y., 65, 67, 70, 71, 73 N. Y., 74, 74 N. Y., 75, 76 N. Y., 82, 86, 86, 102, 106 N. Y., 110 N. Y., 114 N. Y., 115, 119, 125 N. Y., 126, 126, 134 N. Y., 138 N. Y., 142, 155 N. Y., 157, 172, 184 N. Y., 184, 188, 189 N. Y., 196 N. Y., 208, 214, 218 N. Y., 223, 227 N. Y., 238, 246 N. Y., 263, 270, 271, 275 N. Y., 276, 278 N. Y., 283, 284, 306, 307, 310, 311, 311, 312, 314, 315 N. Y., 316, 316 N. Y., 318, 318, 320 N. Y., 322, 336, 338, 339, 340 N. Y., 341, 343, 344, 346, 351, 353 N. Y., 354, 355, 356, 359, 359 N. Y., 363, 371, 371 N. Y., 373, 391 N. Y., 391, 394, 394, 397 N. Y., 397, 399, 403, 403, 414, 420, 423 N. Y., 433 N. Y., 434, 436 N. Y., 438, 439, 454, 462, 486, 487, 488 N. Y., 490, 496, 500 N. Y., 526, 530

Boxwood:
197

Bread:
52, 82, 162, 267, 278, 355, 367, 368, 529

Broom:
306, 367

Brush:
306, 529

Burlap Bag:
118

Business Cards and Letterheads:
19 N. Y., 158 N. Y., 192 N. Y., 192 N. Y., 269 N. Y., 324 N. Y., 355 N. Y., 477, 496 N. Y., 531 N. Y.

Butter Firkins:
442

Buttons:
356

Cabbages:
31, 67, 70, 76, 86, 92, 102, 126, 130, 145, 157, 162, 223, 238, 249, 308, 355, 356, 436, 454

Calf:
216

Candles:
283

Cans:
31, 43, 51, 53, 54, 54, 56, 60, 65, 67, 73, 77, 80, 80, 82, 86, 86, 87, 103, 107, 110, 112, 114 N. Y., 115, 116, 125, 126, 147, 147, 148, 157, 178, 178 N. Y., 178, 188, 190, 191, 195, 197, 208, 216 N. Y., 220, 220, 228, 235, 238, 259, 267, 271, 272, 281, 283, 316, 319, 320, 322, 328, 330, 338, 348, 350, 354, 354, 355 N. Y., 355, 356, 358, 363, 367, 369, 396 N. Y., 399, 409, 438, 439, 454, 456, 504, 529, 530

Cantaloupe:
10, 70, 102, 123

CAP:
490

CARDBOARD (see pasteboard).

CARDS:
161 N. Y., 162 N. Y., 192 N. Y., 192 N. Y., 217 N. Y., 269 N. Y., 277 N. Y., 290 N. Y., 412, 477, 495 N. Y., 531 N. Y., 532 N. Y.

CARPET SWEEPERS:
114

CARROTS:
70, 77, 87, 102, 103, 126, 134, 145, 157, 176, 220, 223, 238, 245, 249, 336, 436, 523

CARTONS, PAPER:
188 N. Y., 196 N. Y., 235 N. Y., 289 N. Y., 326 N. Y., 339, 354 N. Y.

CASES:
125 N. Y., 135, 141

CATNIP:
10

CATS:
10, 17, 27, 31, 33, 49, 56, 67, 73, 79, 82, 87, 102, 103, 108, 114, 115, 127, 130, 133, 141, 141, 142, 143, 146, 146, 147, 151, 154, 157, 191, 198, 234, 238, 245, 249, 261, 276, 283, 308, 321, 339, 343, 354, 360, 367, 368, 392, 395, 408, 413, 436, 438, 468, 499, 500, 502, 523, 524

CAULIFLOWER:
157

Celery:
10, 157, 162, 178, 230, 238, 499, 529

Chains:
114, 238, 367, 529

Checks:
103 N. Y., 104 N. Y., 184, 192 N. Y., 193 N. Y., 243 N. Y., 246 N. Y., 246 N. Y., 267 N. Y., 268 N. Y., 290 N. Y., 357 N. Y., 436 N. Y., 495 N. Y., 531 N. Y.

Chestnuts:
315

Chickens:
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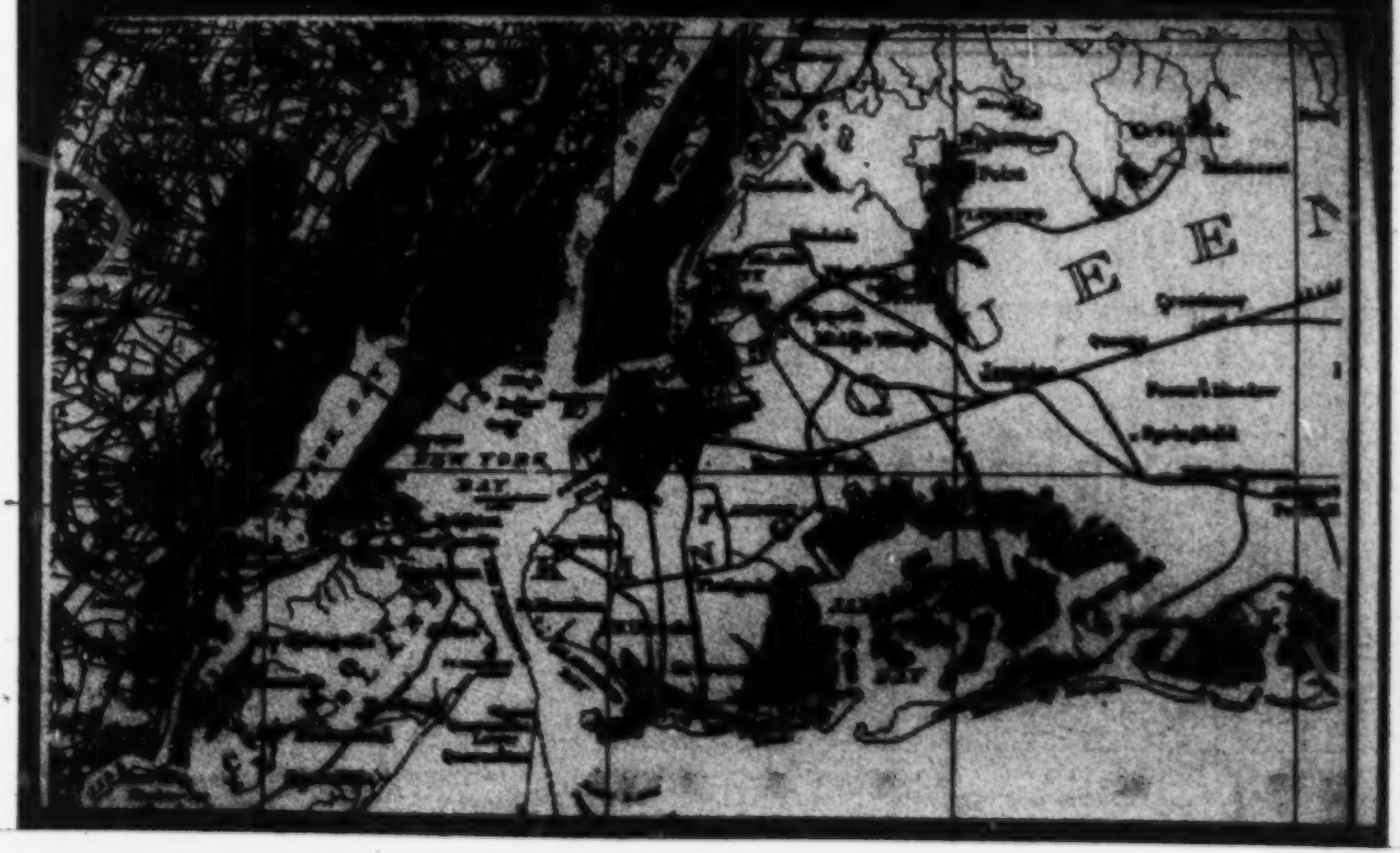
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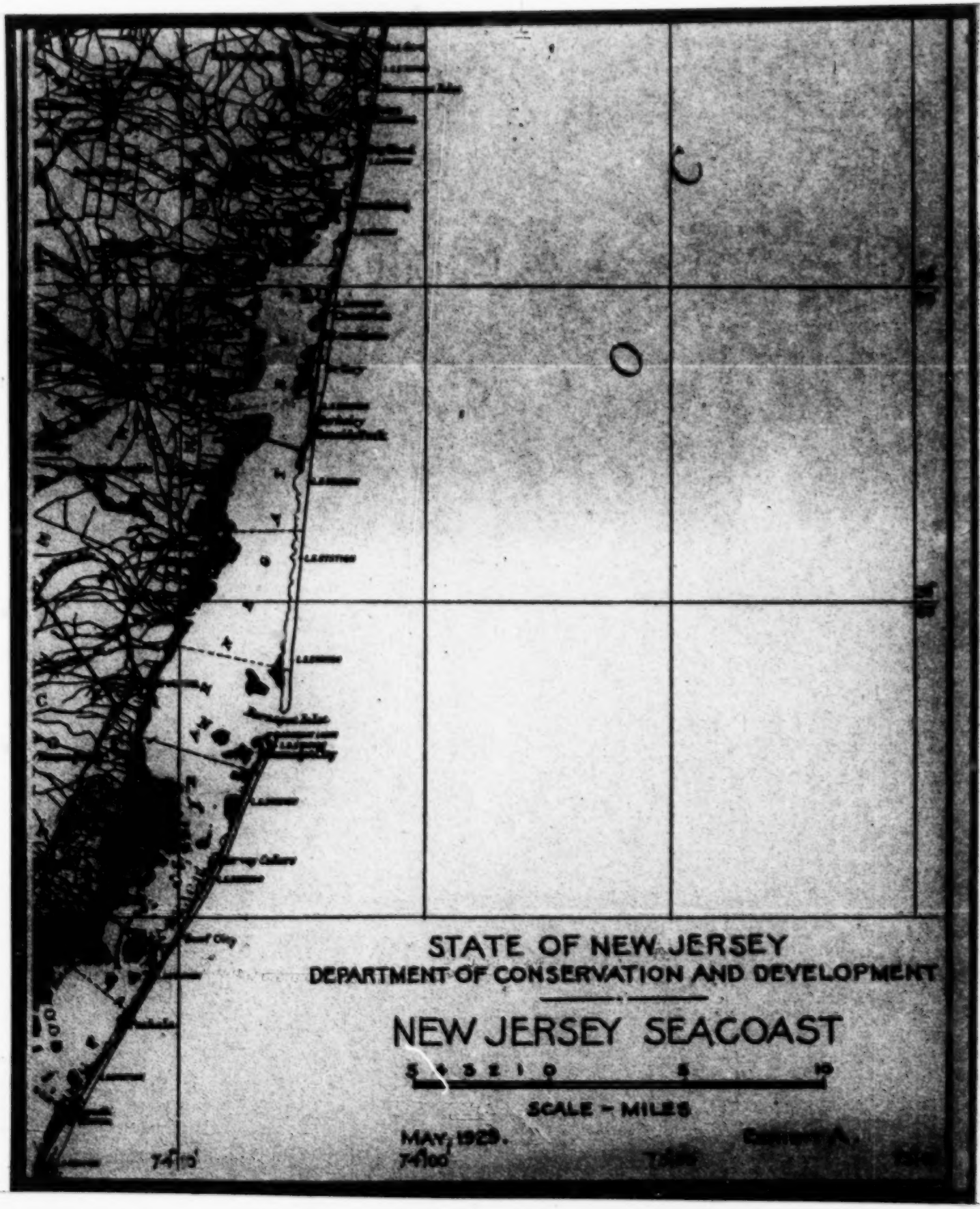
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STATE OF NEW JERSEY
DEPARTMENT OF CONSERVATION AND DEVELOPMENT
NEW JERSEY SEACOAST
5 4 3 2 1 0 5 10
SCALE - MILES
MAY, 1929.
74°15'
74°00'

FILE COPY

APPENDIX "G"

	Population		Depth Front	Value of Roads and Bridges Taken							
	Water	Summer									
[illegible]	1930—12,000 1940—12,000— 20,000	100,000	1 mile	$20,000,000	[illegible]	[illegible]		[illegible]			
Allenhurst	1,000	1,000	1,000 feet		4,000,000			$75,000			$1,000	$ 300,000
Asbury Park	1,500	5,000	2,500 feet		2,500,000	100,000				$ 500,000		40,000
Atlantic City	300	6,000— 8,000	6,100 feet	210,000	2,100,000	40,000	$ 10,000				$2,000 per yr.	
Belmar	2,000	25,000	1.5 miles	700,000	7,500,000	50,000		$30,000	$ 50,000	2,000,000	1939—$2,000	110,000
Bradley Beach	12,000	18,000										
Brielle	2,000	30,000— 40,000	4,000 feet	1,100,000	2,000,000	75,000	40,000		200,000	4,100,000	1935—$200 1936-9—$1,000 1939—$277.72	300,000
Deal			1.25 miles		5,000,000		200,000		250,000		Per yr. $1,000— 1,500	2,000,000
Long Branch	20,000	30,000— 60,000	4.5 miles		20,000,000						Per season $200— 300	
Manasquan	2,500	6,000— 7,000	1 mile		4,000,000	25,000					1939—$500	1,000,000
Ocean Grove	2,500 4,000	25,000— 35,000— 45,000	.75 mile	2,000,000	3,500,000	45,000		50,000	25,000	1,000,000	1939—$200.00 1937— 201.00 1938— 207.04 1939— 194.50	50,000
Point Pleasant											Per wk. $10-15	
Red Bank	500	2,000— 3,000	300 feet	500,000	2,271,230		42,000	150,000 to be built	100,000	500,000	1939—$343.14	50,000
Seaside Heights	1,000	5,000— 6,000	4,500 feet	75,000	1,250,000					300,000	$500	
Seaside Park	500	5,000	1.5 miles		1,000,000	500,000	200,000				$500	
Shrewsbury Boro, Arlington	200	1,500— 2,000			1,500,000						$500	
Spring Lake	1,500— 2,000	15,000— 20,000		2,000,000	7,000,000	40,000		400,000			Per sheets $200 (1939) $700	

OCT [illegible] STATE OF NEW JERSEY,

No. [illegible]

THE CITY OF NEW YORK

Respondent's Brief in Support of its Exceptions to the Report of the Special Master and Motion for a Decree and to the Master's Findings of Fact and Conclusions of Law

ARTHUR J. [illegible]

Corporation Counsel

Solicitor for the Respondent

Office and Post Office Address

[illegible]

FILE COPY

APR 18 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. [redacted]riginal 10

STATE OF NEW JERSEY,

Plaintiff,

—against—

THE CITY OF NEW YORK,

Defendant.

Defendant's Brief in Support of its Exceptions to the Report of the Special Master and His Recommendations for a Decree and to His Refusals to Make Findings of Fact and Conclusions of Law as Requested.

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IN THE

Supreme Court of the United States

October Term, 1930.

Original No. 17.

STATE OF NEW JERSEY,
Plaintiff,

—*against*—

THE CITY OF NEW YORK,
Defendant.

DEFENDANT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER AND HIS RECOMMEDATIONS FOR A DECREE, AND TO HIS REFUSALS TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW, AS REQUESTED.

STATEMENT OF THE CASE.

Pursuant to leave of this court granted in May, 1929, the State of New Jersey filed a bill of complaint against the defendant, The City of New York, praying the court

to issue its writ of injunction perpetually restraining the defendant, its contractors, officers, agents and employees from dumping or suffering to be dumped any garbage, refuse or other noxious, offensive or injurious matter into the Atlantic Ocean or other waters of the United States off the coast of New Jersey and from otherwise defiling or polluting said waters or the beaches of said State.

On leave obtained from this Court, the defendant filed its original answer in June, 1922.

In October, 1929, the plaintiff filed its reply joining issue on the complaint and answer, and asked for the appointment of a Special Master to take testimony, etc.

Thereupon this Court, on October 14, 1929, appointed the Hon. Edward K. Campbell to take testimony, make Findings of Fact and Conclusions of Law, together with recommendations for a decree, all to be subject to consideration, revision or approval by this Court. (Report of Special Master, p. 1.)*

Hearings for the reception of testimony in accordance with the terms of the order were thereafter held on numerous occasions, in different places, in 1929 and 1930. (R.Sp.M., pp. 1-2.)

On February 2nd, 1931, a motion to amend the answer was submitted by defendants to this Court and the same was allowed February 24, 1931. (R.Sp.M., p. 7.)

On March 20th, 1931, the Special Master filed his report with the Clerk of this Court, wherein he found that the plaintiff was entitled to relief in accordance with the prayer of the bill, etc., and recommended a decree accordingly, and that the matter be referred to a Special Master for Findings of Fact as to what would be a reasonable time for the construction of incinerators by defendant, to dispose of its garbage now being dumped at sea. (R.Sp.M., pp. 59-60.)

*All references to page numbers of the Master's Report are to those found in his original report and at the top of the page in the volume of Pleadings, etc., submitted for the Court's convenience.

THE PLEADINGS.

For a summary of the contents of the complaint, the original answer and the amended answer, we refer the Court to the report of the Special Master, pages 2 to 9, inclusive, and will, therefore, not set forth any further description thereof in this brief.

CONSTITUTIONAL PROVISION UNDER WHICH JURISDICTION CLAIMED.

Article III, Section 2 provides in part as follows:

> "The judicial Power shall extend to all Cases in Law and Equity * * * to Controversies between two or more States; * * * between a State and citizens of another State * * *. In all cases * * * in which a State shall be a Party, the Supreme Court shall have original Jurisdiction."

PARTIES AND JURISDICTION.

In the report of the Special Master, at page 9, there is a descriptive heading in the above stated language. Thereunder it is said that this is an original action brought by the State of New Jersey, under a resolution of its Legislature, approved by its Governor, and that the defendant is a municipal corporation of the State of New York. These allegations are, of course, not denied. But there is a further statement that "the case presents a justiciable controversy over which this court has jurisdiction." In order that there may be at the outset no misunderstanding, we desire to state that while the general jurisdiction of this Court over a controversy between a state and a municipal corporation of another state, such as defendant, is not and cannot be contested

in any way, an issue has been raised herein both by denial of certain allegations of the complaint and by the affirmative allegations of the first defense in the amended answer (and by appropriate exceptions to the Master's report) that there is here *not* a justiciable controversy for this Court's decision under the facts presented.

THE FACTS AS FOUND BY THE SPECIAL MASTER.

Near the bottom of page 9 of the Special Master's report occurs the heading "Findings of Fact," under which is an introduction or preamble leading to the heading "General Statement" on page 10. Thereunder are some 17 subdivisions, each with a descriptive subheading. The allegations, or findings under sub heading "(1) Locality," "(2) Area Affected," "(3) Summer Resorts," "(4) Beaches," "(5) Fishing," "(6) Bathing," are not denied, or excepted to although certain evidence from the record will be cited hereafter in connection with the failure of the Master to find certain facts as requested by the defendant, which explain certain facts found, which may well cause different inferences to be drawn therefrom.

Also a portion of the Master's Findings of Fact under subdivision "(7) Garbage," which finds its way onto the beaches of the plaintiff under certain conditions, are not denied. The same may be said of Findings under subdivision "(8) Removal and Expense," "(9) Water and Fish Nets," and "(10) Occurred, When."

Defendant also admits that the Master's Findings set forth under subdivision "(11) Dumping," correctly state the situation in regard thereto, and the same may be said of so much of those appearing under sub-heading "(12) History of Dumping," as appears on page 19 of the report; also all of those Findings set forth under subheading "(13) Complaints."

Many of the other Findings, however, are expected to, so that we will now briefly summarize the admitted facts.

The particular locality affected by this action is the easterly side of the State of New Jersey, bordering on the Atlantic Ocean, for about 50 miles from Highlands (Atlantic) to Beach Haven (see map attached to complaint). Within this 50 miles of ocean frontage are 29 separate municipalities. A substantial portion of the land below highwater mark on this frontage has been conveyed to various municipalities and individuals by different forms of conveyance. The resident population of such municipalities is about 160,000, and the Summer population exceeds this number many times over. The assessed valuation of property within the municipalities for tax purposes exceeds $139,000,000. (R.Sp.M., pp. 10 and 11, "(1) Locality," "(2) Area Affected.")

Such municipalities are seashore resorts frequented by thousands of visitors during the Summer, solely on account of the attractiveness of the sea and beach for fishing, boating, bathing and other recreational purposes. (R.Sp.M., p. 11, "(3) Summer Resorts.")

The beaches along said frontage afford natural advantages for seashore resorts and are patronized as such. To such natural advantages improvements have been added in the way of jetties, piers, boardwalks, pavilions, pools and bathing facilities and casinos, on all of which over $14,000,000. has been expended, and other projects are planned which call for additional large outlays. The beaches are within easy access of New York City and Philadelphia and are visited by large numbers of people from said cities, from other parts of the country and even from abroad. The inhabitants of these shore front municipalities depend for their livelihood chiefly upon the business of maintaining the resorts. People congregate thereat, and clean beaches are of the utmost importance

to the comfort of the visitors and the prosperity of the residents. Many persons also commute during the summer from their private homes in these municipalities to New York and Philadelphia. (R.Sp.M., pp. 11-12, "(4) Beaches")

Numerous citizens have constructed and operate fish pounds, under license therefor required by the State of New Jersey, and have invested many thousands of dollars in such enterprises, which give employment to about 500 persons. The nets of these pounds usually extend from a point about a quarter of a mile from the shore outward for a distance of about 1500 feet, in water about 20 to 35 feet deep, and are supported by poles driven into the ocean bottom. More than 100 of these fish pounds exist, which were valued in 1928 at $700,000., and the fish caught that year sold for about $950,000. Less fish were taken in 1928 than in 1924, 1925 or 1926, but more were taken in 1928 than in 1927. Fishing, as a sport, from the shore or from boats, is also engaged in by many persons. (R.Sp.M., p. 13, "(5) Fishing".)

Surf bathing is indulged in by numbers of persons and the attractiveness of the resorts for this purpose depends on the wholesomeness of the water and the freedom of the beaches from pollution, and unhealthful conditions. (R.Sp.M., p. 14, "(6) Bathing".)

Vast quantities of garbage and refuse are stranded on the beaches in question, being cast theron by the waters of the ocean. The character thereof is described under subheading "(7) Garbage," in the report of the Special Special Master (pp. 14-15).

Such deposits must be speedily removed, especially in Summer, because of offensive odors emanating therefrom, and because they are feeding places for swarms of flies. The odors cause discomfort and nausea. Portions of the deposits are putrid and must be buried or hauled away.

(Other facts concerning the garbage as found by the Special Master (p. 16), especially in relation to health and injuries to property, business and rental values, are contested by the defendant and are, therefore, not set forth here.)

The cost of removal of garbage deposited on the beaches amounts to hundreds and even thousands of dollars a year in many of these municipalities, and to many thousand dollars all told. (R.Sp.M., p. 17, "(8) Removal and Expense.")

When garbage comes ashore a good deal of the same kind is apt to be held in suspension in the adjacent waters, thereby rendering bathing undesirable and impracticable until the water clears in a couple of days or a day after the deposits on the beaches. The garbage and refuse also tears the fish pound nets, fouls them and injuriously affects such business, and also imposes a cost of many thousands of dollars on the owners for the repair of nets. (R.Sp.M., p. 17, "(9) Water and Fish Nets.")

Deposits of garbage occur when the winds are from the east or northeast, especially when strong, or of two or three days' duration, and sometimes they occur with a southeast wind. They occur at some beaches four or five times a season, and frequently throughout the year, varying with the situation of the beaches. (R.Sp.M., p. 18, "(10) Occur, When.")

The defendant has dumped its garbage, street sweepings and rubbish at sea since the Fall of 1918. Its records show deposits averaging more than one million and a third cubic yards per year for the years 1924-1929, inclusive, the amount deposited in 1929 being greater than in either of the three preceding years. Much more is dumped in Summer than in Winter, 192,000 cubic yards being dumped in June and 52,000 cubic yards in February, 1929. Dumping takes place every day of the year except when weather conditions prevent. (R.Sp.M., p. 18, "(11) Dumping.")

For about 20 years prior to 1918, the defendant disposed of its garbage and street sweepings by the reduction system (relatively low temperature burning) and, except for a brief period in 1906 when the reduction plant needed repairs, did not dispose of such materials at sea. In fact, the Master found that the dumping of the defendant's garbage and refuse at sea did not begin until 1918. (R.Sp.-M., pp. 29, 30 "(17) Incinerators".) In 1918 the reduction plant at Barren Island having burned and the succeeding contractor, with a plant at Staten Island, having failed, the City applied to the Supervisor of the Harbor of New York for permission to dispose of its waste materials in the emergency with which the City was confronted. The Supervisor granted the request. An act of Congress of June 29, 1888 (25 Stat., 209) to prevent obstructive and injurious deposits within the Harbor and adjacent waters of New York by dumping or otherwise made provision for the appointment and jurisdiction of this official. As amended, the Act is now part of Sections 441 *et seq.*, U. S. Code. The Supervisor prescribed an area southeast of Scotland Lightship, where dumping should take place, ultimately locating such dumping points at distances of 8, 12 and 20 miles southeast of the Lightship—the 8 mile point to be used in Winter being about 10 miles from the New Jersey shore; the 12 mile point for use in the early Spring and late Fall months being 12½ miles therefrom, and the 20 mile point being for use in the Summer, late Spring and early Fall months, being about 22 miles from said shore. The materials to be dumped are loaded upon scows at designated City docks, from wagons and trucks collecting them in the City. These scows are towed by tugs, in tows of two or three scows, to the area of disposal. Accompanying each of the tug boats is a "Dumping Inspector" from the office of the Supervisor of the Harbor, whose duty it is to see that the dumping

is done within the prescribed areas. He is required to report on each occasion directly to said office the facts as to the scows and place of dumping. (R. Sp. M., pp. 19-20, "(12) History of Dumping.")

The Master has also found as a fact that the City's dumping was by permission of the Supervisor of the Harbor. (R. Sp. M., p. 13.)

Complaints in respects to the condition of the beaches of New Jersey, as a result of the deposit of garbage thereon, made by the officials of the New Jersey municipalities and by the successive Governors of that State, were frequent commencing shortly after the time the City of New York started dumping in 1918. These were made to the Supervisor of the Harbor and to the Secretary of War, and many were by these officials transmitted to the Mayor and to the Commissioner of Street Cleaning of the City of New York. A commtitee appointed by the Mayor of New York in 1921 reported that the practice of dumping garbage at sea was most undesirable. The Governors of New Jersey discussed the same in their annual messages so that the subject became a political matter in that State. (R. Sp. M., pp. 21-22, "(13) Complaints.").

Committees of officials and citizens appointed by the City authorities reported in 1907 and 1921 advising against the method of dumping garbage at sea because the least harmful material sinks and the most harmful floats so that much of the floatable mass will be scattered along the beaches through the action of current and wind (R Sp. M., pp. 27-29 "(17) Incinerators"). The report ofthe Supervisor of the Harbor for 1918 to the Chief of Engineers (U. S. Army) stated that it is apt to wash up on the beaches (R. Sp. M., p. 27 "(16) Appearance and Movement").

Other findings of fact in connection with the last two set headings are not concurred in or admitted and will be discussed elsewhere.

ADDITIONAL FACTS.

In addition to the above admitted facts as found by the Special Master matters of statutory foundation or uncontroverted by the plaintiff will be here set forth.

In 1897 the present City of New York was organized through a consolidation of various contiguous or nearby municipalities under the medium of Chapter 378 of the Laws of 1897 known as the Greater New York Charter. The territory thereby consolidated was subdivided for purposes of local government into the Borough of Manhattan, The Bronx, Brooklyn, Queens and Richmond.

By Sections 96 and 534 of said Charter a Department of Street Cleaning was created with jurisdiction and control over the removal or other disposition as often as the public health might require of ashes, street sweepings, garbage and other like refuse and rubbish.

Four years later Chapter 466 of the Laws of 1901 amended and revised said Charter, Section 383 thereof transferring jurisdiction over the removal of such material in the Boroughs of Queens and Richmond to the presidents of those boroughs. This divided jurisdiction continued until 1929 when Local Law No. 13 of that year adopted by the Municipal Assembly of The City of New York under statutory authority amended and supplemented said revised Greater New York Charter of 1901 and created a Department of Sanitation to which was transferred jurisdiction over the removal and disposition of ashes, street sweepings, garbage and refuse throughout the City. (This brief, Appendix A).

Defendants submitted evidence to the effect that garbage and refuse is dumped from coastwise and other vessels going southward from the Port of New York, the sea lane or route for such vessels being at a distance from

the New Jersey coast of from three miles at the northern end to eight miles off Barnegat Lighthouse (R. Sp. M., p. 31). These coastwise steamers number about twenty a day going south, such vessels doing most of the dumping rather than the northbound (R. Sp. M., p. 31). Some of these vessels feed their crews and accumulate garbage and refuse while in the Port of New York which is not dumped until after passing Scotland Lightship on the way south (R. Sp. M., p. 32). Fogbound vessels off the entrance to the harbor of New York throw over garbage and refuse material accumulated during their stay (R. Sp. M., p. 33).

The kind of garbage and refuse dumped by many of these coastwise ships is of the same kind and character as that found on the beaches of New Jersey and is referred to in the Special Master's Report, page 32. (For greater details see Abstract of Testimony, pp. 554-555, 556, 584, 585, 614-616).

The report to the Supervisor of the Harbor for 1929 to the Secretary of War (Plaintiff's Exhibit 335, page 281, Abstract of Testimony, pp. 541-542), specifically states:

> "It is probable that a great deal of garbage is dumped at or inside the harbor entrance by the enormous tonnage passing in and out of New York, and also that the local floating equipment throws more or less garbage overboard."

It is uncontroverted by plaintiff that at least three (four—Pr. A. 547) different concerns dump "cellar dirt" at the four-mile limit southeast of Scotland Lightship and several others dump cellar dirt mixed with rock at the six-mile limit (R. Sp. M., p. 34).

Not only is cellar dirt so dumped intermixed with rock, but, as described by Supervisor Anderson of the Harbor of New York it "is debris from buildings that have been torn down" (Abstract, p. 537) and that "debris" means "joists, timbers, lath and plaster of a very light kind." It would be light small floatable material, wood or paper (Abstract, pp.545-546). Sometimes cargoes of condemned foodstuffs are dumped a short distance beyond the area used by the defendant and scows of the Brooklyn Navy Yard dump materials consisting of refuse and some garbage at the City's dumping point (R. Sp. M., p. 34).

While reciting this evidence the Special Master did not make any specific findings of fact in relation thereto. It was offered by the defendant in support of its contention set forth in its second separate defense in its amended answer both in the form of a proposed finding of fact (66) and in the form of a proposed conclusion of law (20) that by reason of the deposit in substantial quantities of garbage, cellar dirt and unsanitary sewage in the Atlantic Ocean by agencies other than the defendant at points much nearer to the coast of the plaintiff or no further therefrom than where deposits of garbage and refuse were made by defendant, it is impossible to determine whether such garbage and refuse deposited by defendant in said ocean off the coast of the plaintiff reaches its waters and beaches in substantial quantities.

(It is to be noticed that the City of New York does not contend that *if* its garbage reached New Jersey's beaches it is excused because garbage and refuse from other sources also reached those beaches. The contention of the defendant is rather that in the state of the proof it cannot be determined definitely whether the City's garbage reaches New Jersey's beaches in substantial quantities.)

In spite of the evidence of the deposit of garbage and refuse in the ocean by agencies other than the defendant much nearer New Jersey's beaches than deposits made by the defendant in the ocean, the Special Master found that large masses of floating and submerged garbage dumped by defendant were carried by winds and water upon the plaintiff's shores (R.Sp.M. p. 27); that the defendant has delayed unreasonably in adopting a proper method of the disposal of its garbage and refuse (R.Sp.M. p. 30); that the amount of garbage reaching plaintiff's shores from coastwise and other vessels and other causes is negligible in comparison with that being dumped by defendant and reaching plaintiff's shores (R.Sp.M. p. 36); that garbage and refuse dumped by defendant's scows reaches plaintiff's waters and shores and do great injury to fishing and bathing in said waters (R.Sp.M. p. 41); that the act of Congress of June 29, 1888 (29 Stat. 209, as amended) and compliance with permits issued to the defendant thereunder by the Supervisor of the Harbor furnishes no defense to defendant nor relieves it from the effect of the public nuisance created by its action in dumping its garbage at sea (R.Sp.M. p. 49); that dumping of garbage at sea by defendant, as described in the report, results in a public nuisance and that plaintiff and communities affected should not be required to tolerate the same (R.Sp.M. p. 53); that even if the plaintiff is held to strict proof the objectionable conditions on the beaches and in the adjacent waters of the plaintiff are caused by defendant's dumping its garbage and refuse at sea as described in the report (R.Sp.M. pp. 56-57); that the parties to the action are subject to the decrees of the court and the property affected is within the United States (R.Sp.M. p. 58); that the court has jurisdiction and that the plaintiff is entitled to relief in accordance with the prayer of the bill of complaint from

the nuisance created by the defendant upon the beaches and property of the plaintiff (R.Sp.M. p. 59).

The defendant has filed exceptions to the above findings of fact and conclusions of law as well as to others and to the recommendations for a decree contained in the report of the Special Master. It has also filed exceptions to the Special Master's refusal to find certain proposed findings of fact and conclusions of law submitted by defendant. The plaintiff has not filed any exceptions; therefore, such of the Master's findings of fact and conclusions of law as are unfavorable to plaintiff's contentions must be regarded as accepted by the plaintiff.

That the above quoted findings of fact and conclusions of law and other particular conclusions not specifically referred to above are not justified is contended in detail in the following argument.

SUMMARY OF THE DEFENDANT'S ARGUMENT ALLEGING ERROR ON THE PART OF THE SPECIAL MASTER.

I.

The Special Master erred in overruling defendant's contention that the dumping into the Atlantic Ocean of garbage and refuse by the City of New York at points designated by the Supervisor of the Harbor of New York, distant from the coast of New Jersey of from ten to twenty-two miles, constitutes the deposit of such garbage and refuse not in navigable waters of the United States, but in the high seas more than a marine league from the beaches and territorial waters of the State of New Jersey, over which this Court has in this case no authority, control or jurisdiction.

A. Character of the plaintiff's claims.

B. The Master erred in his findings and conclusions that the facts in this case present a justiciable controversy over which this Court has jurisdiction and in making all subordinate findings and conclusions in support thereof and in failing and refusing to find and conclude as requested by defendant in this regard.

(1) Jurisdiction lacking because the situs of the nuisance is beyond the territorial jurisdiction of this Court.

(2) The character of the case is such that the controversy is not justiciable.

C. Plaintiff's failure to prove that the defendant dumped its garbage and refuse into the navigable waters of the United States.

II.

The Master erred in his findings of fact and conclusions of law to the effect that garbage and refuse in large quantities dumped by the defendant in the Atlantic Ocean more than a marine league from the shores and waters of the plaintiff is driven and carried by the winds and waters to and upon the beaches of the plaintiff and its adjacent waters, thus creating a public nuisance, to the great injury of the plaintiff's rights and property.

A. The Special Master erred in failing to find that the plaintiff must prove its case by clear and convincing evidence and in finding that even if such rule applied conditions on plaintiff's beaches and in its waters were shown to be due to defendant's acts.

(1) Weakness of the plaintiff's evidence in regard to the dropped bottles.

(2) Weakness of the proof that garbage, the dumping of which from city's scows was actually seen, ever reached plaintiff's shores.

(3) The plaintiff's proof was weakened by the absence of expert evidence to counteract testimony as to the influence of the tides in retarding garbage dumped ten to twenty miles from the plaintiff's beaches from reaching the same.

III.

The Master erred in finding that compliance by the defendant in respect to the locality in which its garbage was dumped with permits issued by the Supervisor of the Harbor of New York, under authority of the Act of Congress on June 25, 1888 (25 Stats. 209) as amended (Title 33, Chap. 9, Secs. 441-451, U. S. Code), does not relieve the defendant from the effect of the public nuisance resulting from and created by said dumping.

IV.

The Master erred in finding that such garbage as reaches the plaintiff's shores from dumping by coast-

wise and other vessels and from other sources, is negligible in comparison with that dumped by defendant and reaching plaintiff's shores.

V.

The Master erred in his findings and conclusions that the defendant has delayed for an unreasonably long time in erecting incinerators to dispose of its garbage.

VI.

The Master erred in finding that on all of the evidence a case for equitable relief in favor of the plaintiff was made out.

A. Complete Failure of Proof by Plaintiff as to loss of property or rental values in its seashore communities.

B. Counterbalancing evidence for defendant of the Summer popularity, growth of the communities and investments therein and increase in assessed values during the years while Defendant is charged with fouling Plaintiff's beaches and waters.

CONCLUSION.

The findings and conclusions of the Special Master should be overruled; the proposed findings of fact and conclusions of law of the defendant approved; the recommendations of the Special Master for a decree should be disregarded and a decree should be entered dismissing the bill of complaint.

I.

The Special Master erred in overruling defendant's contention that the dumping into the Atlantic Ocean of garbage and refuse by the City of New York at points designated by the Supervisor of the Harbor of New York, distant from the coast of New Jersey of from ten to twenty-two miles, constitutes the deposit of such garbage and refuse, not in the navigable waters of the United States, but in the high seas more than a marine league from the beaches and territorial waters of the State of New Jersey, over which this Court has in this case no authority, control or jurisdiction.

A. Character of the plaintiff's claims.

The plaintiff claimed that the defendant's garbage dumped "into the navigable waters of the United States" (complaint, par. 11) is driven by the winds and tides upon the beaches of the plaintiff where it pollutes the sea and land until removed (complaint, par. 14) and that the necessary removal thereof by municipalities and citizens of the plaintiff requires the expenditure of more than $100,000 annually (complaint, par. 15). The complaint also alleges that such garbage is poisonous and injurious to human beings and to fish and fish life; obstructs and impedes the navigation of the waters of the United States; injures and destroys the nets of fish pounds and renders the waters unfit for fishing, boating or bathing (complaint, par. 16); that such dumping creates a public nuisance impairing the wholesomeness and safety of said waters, beaches and shore front facilities of the plaintiff and its municipalities thereby damaging plaintiff's property and seriously menacing the health, safety and welfare of the plaintiff and its citizens (par. 17). All of these

allegations are denied by the defendant (original and amended answers, paragraphs "Second" and "Third").

In defendant's opinion it is essential to the success of the plaintiff's case that there should be a finding that the defendant dumped its garbage and refuse into the navigable waters of the United States for not only is this denied by the defendant as aforesaid, but in its First Defense (see amended answer, paragraph "Fifth"), it alleges that its dumping was not within the navigable waters of New Jersey *nor within the navigable waters of the United States* but on the high seas at points in excess of one marine league from the shores of New Jersey and that therefore this court has no authority to enjoin the defendant from such dumping.

Although the Special Master found that the dumping areas used by the defendant are situated at distances of 8, 12 and 20 miles southeast of Scotland Lightship and 10, 12½ and 22 miles from the shores of New Jersey (R. Sp. M., p. 20), we are unable to discover any finding of fact or conclusion of law to the effect *that the dumpings are into the navigable waters of United States as alleged by the plaintiff, or take place on the high seas without the navigable waters of this country as alleged by the defendant.* In other words, the report is silent in both directions on this very important matter.

It is true that there is a finding of fact on page 50 of the Master's report that "some scows have left upon them considerable quantities of garbage or refuse after their gates have been thrown open to release the contents and these remnants are cast off by the men in charge as the scows are being taken back from the dumping area." We shall have more to say about this finding later, but it is sufficient to state here that it does not fix the place of any of these so-called short dumpings and as a matter of

fact they cannot be located as taking place within the 3-mile limit.

Before going further in this argument it should be noted that claims for relief from several different kinds of injuries are set forth in the complaint.

Obstruction of navigation of fishing and other boats and injuries to fishing rights and fish nets due to the dumping of garbage in the ocean by the defendant are maritime torts (*Crappo* v. *Kelly*, 16 Wall., 610, 623; *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S., 52, 58). Usually the forum for the redress of such injuries is an admiralty court (*The Armorica*, 189 Fed., 503, 504; *The Blackheath*, 195 U. S., 361; *The Raithmoor*, 241 U. S., 166). Whether these alleged injuries should be considered in this action if the finding relating to the defendant's responsibility therefor is sustained, we question. The other alleged injuries are land torts with injuries to bathing rights on the dividing line.

Practically all of the alleged injuries concerning which findings were made by the Special Master in favor of the defendant were *consequential* rather than direct. What will be considered direct and what consequential injuries or damages seems to vary somewhat with the circumstances, but the general rule has been well expressed by the Supreme Court of Georgia in the head-note or syllabus by the court in the case of:

> *City of Dublin* v. *Ogburn*, 142 Ga., 840 (83 S. E., 939).

> "Direct damages are such as follow immediately from the act done. Consequential damages are such as are the necessary and connected effect of the tortuous act though to some extent depending on other circumstances."

Here the dumping points were located many miles from the places of injury. The Master found that the (R. Sp. M., p. 46) dumping "was done at eight, twelve and twenty miles according to the season of the year, southeast by east from Scotland Light" and that (R. Sp. M., p. 20) the dumping areas are approximately ten, twelve and a half and twenty-two miles, respectively, from the shore of New Jersey. In order to produce the injuries alleged to have been suffered it was necessary for a combination of circumstances to exist and coincide. The Master found (R. Sp. M. "(10)", p. 18):

> "The deposits of garbage and refuse on the beaches occur when the winds are from the east or northeast * * *. Sometimes the garbage and refuse is brought in by southeast winds. The heavier deposits occur on some of the beaches four or five times a season, and occur frequently throughout the year, varying in number with the different beaches."

Also (R. Sp. M. "(16)", p. 25):

> "Such parts of the garbage or refuse as float either on the surface or in suspension in the water, move with the direction of the wind and current, the wind exercising the greater influence on the direction of its movement. The mass moves at times westward and northward or towards the shores of New Jersey or Long Island, according to the direction and velocity of the wind."

(There is an exception to this finding for its omission to take into consideration the influence of the tides).

Yet, as found by the Master (R. Sp. M. "(15)", p. 24.

> "The dumping goes on each day except when the weather prevents taking the scows to sea * * *."

Even plaintiff's chief investigator, Smack, who, the Master found, made over 30 trips to the dumping grounds (R. Sp. M., p. 25) testified (Pr. A. 15):

> "Most of the time we went out, we caught a wind from the south, which carried it (the garbage) in the direction of the Long Island shore."

It is, therefore, apparent that it is far from the natural and probable consequence that most of any garbage dumped, or that garbage dumped on a majority of occasions, will ever reach defendant's shores or waters assuming (without admitting) that it is defendant's garbage which finally reaches there in substantial quantities as found by the Master. We think, therefore, that there can be little doubt but that the injuries alleged herein are *consequential* and not direct. Authorities in analogous cases of trespass and nuisance sustain the contention.

> *Chipman* v. *Palmer*, 77 N. Y., 51;
> *Gordon* v. *Ellenville & Kingston R. R. Co.*, 193 N. Y., 137;
> *Burt Olney Canning Co.* v. *State*, 230 N. Y., 351;
> *Swain* v. *Tennessee Cop. Co.*, 111 Tenn., 430 (78 So. W., 93).

In the *Chipman* case, *supra*, where the alleged injury was due to the pollution of a stream by sewage thrown therein by an upper riparian proprietor which injured the

boarding house business of a lower riparian proprietor, the Court of Appeals of New York said (page 53):

> "The right of action arises from the discharge into the stream, and the nuisance is only a consequence of the act."

In *Swain* v. *Tennessee Copper Co., et al. supra*, we have another angle of the famous controversy which finally ended in *Georgia* v. *Tennessee Copper Co.* (206 U. S., 230). The action was to recover damages for a nuisance created by several defendants in the operation of their smelting plants. Judgments sustaining demurrers by the defendants were affirmed in the Supreme Court of Tennessee, the Court stating (78 S. W., page 95):

> "This rule (that separate creators of a nuisance could not be held liable for damages) has been held peculiarly applicable to actions for the recovery of damages caused by nuisances of the character of that in question, resulting from the conduct of a number of persons acting independently of each other because the damages in such case are not the direct and necessary consequences of the wrongful conduct of the defendants, but merely the natural results, known as 'consequential damages,' for which no action will lie unless they are special (that is, not common to the general public), but which must be specially averred and proven."

We know of nothing in the case of *Huffmire* v. *Brooklyn*, 162 N. Y., 584, cited by the Master at page 49 of his report which overrules the doctrine of these cases. There the plaintiff's oyster bed was in the bottom of a creek into which defendant's sewer emptied only 300 feet

therefrom. It was, therefore, inevitable that the sewage should reach the oyster bed and the injury may well have been considered direct. The discharge of sewage considered in *Haskell* v. *New Redford*, 108 Mass., 208 (R. Sp. M., p. 48) and *Brayton* v. *Fall River*, 113 Mass., 218, was either directly upon plaintiff's property or within a few feet thereof. The injuries were consequently direct and the same is probably the way in which the court treated them in *Noonan* v. *City of Albany*, 79 N. Y., 476 (R. Sp. M., p. 49).

B. The Master erred in his findings and conclusion that the facts in this case present a justiciable controversy over which this Court has jurisdiction and in making all subordinate findings and conclusions in support thereof and in failing and refusing to find and conclude as requested by defendant in this regard.

(1) *Jurisdiction lacking because the situs of the nuisance is beyond the territorial jurisdiction of this court.*

(It must be constantly borne in mind that the Special Master found as set forth in the statement of facts that the dumping areas and the place where defendant dumped its garbage were at distances of 8, 12 and 20 miles southeast of Scotland Light Ship, and 10, 12½ and 22 miles respectively from the shore of New Jersey (R. Sp. M., pp. 20, 46).

Twelve separate exceptions were taken under this heading in the section designated "A" of defendant's exceptions.

Exception No. 1 objects to so much of the Conclusion of Law set forth under the heading, "Parties and Jurisdiction" (R. Sp. M., p. 9) as concludes that the case presents a justiciable controversy over which this court has jurisdiction.

Exception No. 3 is to the same effect.

Exception No. 11 is an exception to the failure and refusal of the Special Master to conclude as a matter of law (Defendant's Proposed Conclusion of Law 15) that no justiciable controversy is presented.

Exception No. 1a is an objection to so much of the Special Master's Report as finds or concludes that both the aggrieved and the offending parties are subject to this court's decrees.

Exception No. 7 is an objection to the failure of the Special Master to find as requested by the defendant (Proposed Finding of Fact 53) that the Atlantic Ocean dumping grounds used by the defendant in dumping its garbage are not within the navigable waters of the United States.

Exception No. 8 is an objection to the failure of the Special Master to conclude the same thing as a matter of law.

Thus in every possible way in which the contention of the defendant, and the alleged error of the Master could be raised, is it presented to this Court.

Briefly, our contention is that this alleged nuisance was committed by this municipal corporate defendant (if at all) outside the territorial limits of the United States and therefore, in the absence of statute, outside of the jurisdiction or authority of this Court to restrain the same by injunction herein.

It is said in the course of the opinion in

> *Central Railroad Co. v. Jersey City*, 209 U. S. 473, 479
>
> "• • • boundary means sovereignty, since in modern times sovereignty is mainly territorial unless a different meaning clearly applies."

The territorial jurisdiction of the United States when unaffected by statute has in no way been better defined than in

Cunard Steamship Co. v. *Mellon*, 262 U. S. 100, 122-123.

"It is now settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles. *Church* v. *Hubbart*, 2 Cranch, 187, 234; *The Anne*, 1 Fed. Cas., p. 926; *United States* v. *Smiley*, 27 Fed. Cas., p. 1132; *Manchester* v. *Massachusetts*, 139 U. S. 240, 257-258; *Louisiana* v. *Mississippi*, 202 U. S. 1, 52; 1 Kent's Com., 12th ed., * 29; 1 Moore International Law Digest, § 145; 1 Hyde International Law, §§ 141, 142, 154; Wilson International Law, 8th ed., § 54; Westlake International Law, 2d ed., p. 187, *et seq.*; Wheaton International Law, 5th Eng. ed (Phillipson), p. 282; 1 Oppenheim International Law, 3d ed., §§ 185-189, 252."

See also,

United States ex rel. Claussen v. *Day*, 279 U. S. 398, 401;
The George & Earl, 30 Fed. (2nd) 441, 443.

It is said in

Lord v. *The Steamship Co.*, 102 U. S. 541, 544:

"The Pacific Ocean belongs to no one nation but is the common property of all."

This does not mean that Congress cannot, by legislation, extend these limits in relation to subjects of peculiar interest to the country and its policies and within the powers of that body, such as prohibition enforcement.

> *Cunard Steamship Co.* v. *Mellon*, *supra*, page 129; *Maul* v. *United States*, 274 U. S. 501.

We also refer the Court to *Jones* v. *United States*, 137 U. S. 202, and *The James G. Swann*, 50 Fed. 108. In the *Jones* case, *supra*, the question involved was the power of the United States to extend by legislation the provisions of an act punishing murder on the high seas to the Guano Islands. The power of Congress was sustained and the Court said (page 212):

> "Who is the sovereign *de jure* or *de facto* of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds all judges, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court and it has been affirmed under a great variety of circumstances" (citing authorities).

The case of *The James G. Swann*, *supra*, involved a libel in admiralty against a vessel charged with violation of a United States statute against killing seals in Behring Sea. In this case the seals were killed some seventy miles from land and the District Court said (pages 110-111):

> "As our government is constituted, the President and Congress are vested with all the responsibility and powers of the government for determination of questions as to the maintenance and extension of our

national dominion. It is not the province of the court to participate in the discussion or decision of these questions, for they are of a political nature and not judicial."

These contentions of ours are sought to be avoided by the finding of the Special Master that the property affected is within the United States.

We have excepted to that finding (Exception No. 2). While we shall assume, for the purpose of argument, that the Master meant that the property injured was within the United States, we do not think that his phrasing was apt. It is not by any means beyond the realm of possibility that the property affected might be the scows of the defendant which dumped garbage from ten to twenty miles off shore.

Also there was much testimony in the record concerning the injury to lobster pots by direct dumping operations far beyond the three mile limit (Pr. A. 46, 47, 77, 318, 347-348, 351, 375, 398). However, the Master made no specific finding as to injury to this kind of property.

Still, even if the beach property injured (in the sense that rights in relation thereto or persons thereon were injuriously affected) *it seems to be thoroughly well settled that in cases of nuisance or trespass the locality or place where the act occurs which makes possible the nuisance or trespass is the situs of the tort.*

Horne, et al, v. *City of Buffalo, et al,* 49 Hun. (N. Y.) 76;

Chipman v. *Palmer,* 77 N. Y. 51;

People v. *International Nickel Co.,* 168 App. Div., 245, aff'd. on opinion below 218 N. Y., 644;

Ladew v. *Tennessee Copper Co. et al,* 179 Fed., 245 (aff'd. on another question 218 U. S., 357).

In the *Horne* case, *supra*, the plaintiff, suing as the Board of Water Commissioners of the Village of Suspension Bridge, brought an action in Niagara County (New York) to restrain the defendant City from dumping sewage and refuse matter into the Niagara River which polluted its waters at Suspension Bridge and rendered the same unfit for domestic use. The defendant City, which was located in Erie County, made a motion under the authority of Section 982 of the Code of Civil Procedure of New York, to change the place of trial from Niagara to Erie County, where the objectionable deposits were made.

The opinion states (pages 77-78 and 79):

> "By section 982 it is provided that an action for a nuisance must be tried in the county in which the subject of the action, or some part thereof is situated. * * * The subject of an action, as that phrase is used in this section, is that which is to be directly affected, in case the relief demanded by the plaintiff is granted, as in an action of ejectment the land described in the complaint or in an action for a nuisance the object or structure mentioned and alleged to have been unlawfully constructed or erected, or the action, practice or doings of the defendant, which are charged to be illegal and are stated in the complaint as the foundation for the relief demanded.
>
> In most instances the subject of a nuisance has a situs and is in some way or manner connected with, or attached to the realty and is capable of a local description, so that the precept which may be issued by the court to carry its judgment into effect, may designate the object or structure, which is to be abated by the officer to whom the precept is directed. By the common law an action for a nuisance is re-

> garded as local in its nature and the venue is required to be laid in the county where the nuisance was situated. *(M. and I. N. Co.* v. *Douglas,* 2 East, 502; *Warren* v. *Webb,* 1 Taunt., 379; *Vt. and Mass. R. R. Co.* v. *Orcutt,* 16 Gray, 116; *Queen* v. *Cotton,* 102 Eng. Common Law [1 Ellis & E.], 202.
>
> • • • • • • • •
>
> The intention of the legislature to make an action for the abatement of a nuisance local, is clearly manifested by classifying it with actions which are, in their nature, local, such as ejectment and waste.
>
> I am clearly of the opinion that the nuisance described in the complaint is situated in the county of Erie at the place where the defendants are in the habit of dumping foul substances in Niagara river."

We have already referred to the question involved in the case of *Chipman* v. *Palmer, supra.* We again quote from the opinion at page 53 as follows:

> "It (the injury) was occasioned by the discharge of sewerage from the premises of the defendant and other owners of lots into the creek separately and independently of each other. The right of action arises from the discharge into the stream and the nuisance is only a consequence of that act. The liability commences with the act of the defendant upon his own premises, and this act is separate and independent of and without and regard to the act of the others."

In *People* v. *International Nickel Co., supra,* the defendant was indicted for the commission of an alleged nuisance because of the escape of deleterious fumes, gases and odors emitted from its industrial plant and carried

into the State of New York from the State of New Jersey where the plant was located. The defendant demurred to the indictment and the demurrer was sustained from the lowest court of New York to the highest. In the course of the opinion of the Appellate Division it is said, p. 247:

> "It is the maintenance of the thing itself, the misuse of the plant, that is the nuisance. The noxious matters given off as a result of its operation are the evidences and effects of the nuisance. (*People* v. *Central R. R. Co. of N. J.*, 42 N. Y., 283; *State* v. *Babcock*, 30 N. J. L., 29; *Matter of Eldred*, 46 Wis., 530.)
>
> The situs of this nuisance is in another State."

(The court also suggested that a remedy might be had by means of a suit by the State of New York in a controversy justiciable in the Supreme Court of the United States [*Georgia* v. *Tennessee Copper Co.*, 206 U. S., 230]. Such a suggestion might be perfectly apt in that case because the alleged nuisance took place within the territorial jurisdiction of the United States Supreme Court, which, we contend, is not so here.)

Ladew, et al. v. *Tennessee Copper Co.* (and *Ducktown S. Copper & Iron Co., Ltd.*), *supra*, also involved the famous controversy over efforts to restrain the defendants from polluting the atmosphere with poisonous fumes from their furnaces located in Tennessee and injuring property of the plaintiffs located in Georgia. The action was brought in the United States Circuit Court for the Eastern District of Tennessee. The defendants moved to dismiss. In connection with the motion of the Ducktown Company, it was said by Judge Sanford (p. 253):

> "While an action to abate or restrain a nuisance is of a local nature and can only be maintained in

> a district having the proper territorial jurisdiction, the venue of such action is in the district where the nuisance itself is located."

The learned Judge then proceeded to discuss several cases to which we shall hereafter refer, and also the *Horne* case, *supra*, and summed up his conclusion as follows (p. 254):

> "While none of these cases, except the *Horne* case, represented the precise situation in the present case, where the property constituting the nuisance lies in one district and the injured property in another, the reasoning in the *Ward* case that, where the court 'had no power over the local object inflicting the injury,' its abatement was beyond the jurisdiction of the court and shows conclusively that the test of local jurisdiction in an action to abate a nuisance is the situs of the object inflicting the injury and not that of the object injured."

See also:

> *Northern Indiana R. R. Co.* v. *Michigan Central R. R. Co.*, 15 How., 233;
> *Mississippi & Missouri R. R. Co.* v. *Ward*, 2 Black, 485;
> *McGowan* v. *Columbia River Packers' Ass'n.*, 245 U. S., 352.

In *Mississippi & Missouri R. R. Co.* v. *Ward*, *supra*, Ward sued the defendant company, a citizen of Illinois, in the District Court for Iowa to restrain the continuance of an alleged nuisance due to the manner of the construction of a bridge over the Mississippi River. The boundary between Iowa and Illinois was through the center of

the river. The main channel of the river and the alleged obstruction thereto was on the Illinois side. The plaintiff, Ward, operated steamboats which he alleged were injured by this obstruction to the main channel. In holding that the District Court of Iowa had no jurisdiction of the subject of the action the Supreme Court said (p. 194):

> "An indictment could only have been prosecuted against the owner for keeping up the nuisance in Illinois in the Courts of that State, because the nuisance was a trespass and crime against the laws of Illinois, and the injuries to the complainant's boats giving him the privilege to sue and abate the obstruction was as local as the public right to indict. He asks nothing from the person of the defendant, but seeks to remove a local object, because he has sustained special damage from that object.
>
> The District Court has no power over the local object inflicting the injury; nor any jurisdiction to inquire of the facts, whether damage had been sustained, or how much. These facts are beyond the Court's jurisdiction and powers of inquiry, and outside of the case."

We realize, of course, that the district courts of the United States have a jurisdiction limited by statute in respect of the area within which they operate. If, however, the jurisdiction of this court is by a long line of precedents and by public policy limited to the territorial boundaries of the country, unless enlarged by statute in appropriate cases, then the reasoning of the above cases applies.

If the situs of the object inflicting the injury is the controlling factor and that is outside the territorial limits

of the United States, why is not the matter of its abatement outside the jurisdiction of this court.

Some interesting observations pertaining to these cases are also contained in the opinion of Judge Hough in deciding the case of *United States* v. *Newark Meadows Imp. Co.*, 173 Fed., 426. There was an indictment there for a violation of the New York Harbor Anti-Dumping Statute (Act of June 29, 1888, 25 Stat., 209 as amended, now Title 33, Chap. 9, U. S. Code, Sections 441-451).

That statute was discussed at length in the Special Master's Report under heading, "Some Questions of Law —2. Permits" (pages 41-49). We deem it, therefore, unnecessary to set it forth in full here, although it will be referred to more specifically hereafter.

The dumping under consideration in that case took place 2¼ miles from the coast of New Jersey. The indictment was demurred to in order to test the jurisdiction of the Circuit Court for the Southern District of New York. The Court held (page 427):

> "The crime (of dumping) is committed where the scow is dumped."

It was consequently held that as the dumping took place in New Jersey the court had no jurisdiction. The boundary agreement and treaty between New York and New Jersey was discussed and it was also said (page 429):

> "That the territorial jurisdiction of the United States extended a marine league from the coast of New Jersey was asserted by the trial court and approved by the Supreme Court in *Wibory* v. *United States*, 163 U. S., 632, 16 Sup. Ct., 1127, 1197, 41 L. Ed. 289."

The Attorney General of the United States long ago (January 6, 1892), advised the Secretary of War that under the then state of the law and that statute, that deposits of ballast more than a marine league from the shore could not be prevented, saying:

> "I know of no statute authorizing such interference nor any power to so interfere in the absence of statute."
>
> (20 Opinions, Attorney General, 293).

This is re-enforced by the following excerpt from the opinion of the Supreme Court in the case of

> *Williamette Iron Bridge Co.* v. *Hatch*, 125 U. S., 1, 8:
>
> "The power of Congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, is not questioned. But until it does pass some such law, there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers, unless it be the maritime law, administered by the courts of admiralty and maritime jurisdiction. No precedent, however, exists for the enforcement of any such law; and if such law could be enforced (a point which we do not undertake to decide), it would not avail to sustain the bill in equity filed in the original case. There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the States."

See also—

New Jersey v. *Sargent*, 269 U. S., 328.

It was said at page 337 of the opinion:

> "That the power to regulate interstate and foreign commerce which the Constitution vests in Congress includes the power to control, for the purposes of such commerce, all navigable waters which are accessible to it and within the United States whether within or without the limits of a state."

It might well be that for certain purposes Congress could regulate transactions of citizens even without the territorial limits of the country as it seems to have done in the enforcement of the Prohibition Laws. Furthermore, it would seem that garbage dumping in the ocean might be regulated under the commerce power in the same way as has been done through the establishment of quarantine stations (*Morgan* v. *Louisiana*, 118 U. S., 455, 465).

If the above doctrine applies to this case then we do not see how the plaintiff can succeed. In so saying we do not wish to be thought to have overlooked certain cases which hold that where equity has jurisdiction of the person of the defendant it may give a personal decree against him, although the *res* of the controversy is beyond the jurisdiction of the court.

These cases, however, seem to be based on the principle that the court's decree can be enforced personally by contempt proceedings if disobeyed, or in some other personal manner.

A recalcitrant municipal corporation, however, cannot be imprisoned for contempt, or, in the absence of statute, fined. Its public property cannot be taken for the pur-

pose of collecting judgments or enforcing decrees against it. (*Workman* v. *New York City*, 179 U. S., 552, 565).

While its works of art, such as statutes or pictures might possibly be seized, it is hardly thought that this is in contemplation of the provision for the personal enforcement of equitable decrees.

Is it to be vicariously compelled to act through proceedings against its Mayor, or its Commissioner of Street Cleaning, or its Sanitation Commission? If so, why were these officials not made parties? The statutory provision in force in May, 1929, when this action was begun provided (See Appendix A), that as to the boroughs of Manhattan, The Bronx and Brooklyn:

> "the commissioner of street cleaning shall have cognizance and control:
>
> 1. Of the sweeping and cleaning of the streets of the city and of the removal, or other disposition as often as the public health * * * may require, of ashes, street sweepings, garbage and other light refuse and rubbish * * *."
>
> (Sections 533 and 534 Greater New York Charter, being Chapter 378 of the Laws of 1897 as amended by Chapter 466 of the Laws of 1901).

On December 1st, 1929, this jurisdiction (except that it was applicable to the entire city and not the three boroughs mentioned), was transferred to the Sanitary Commission as head of the Department of Sanitation (Greater New York Charter, Section 605-a as added by Local Law No. 13 of 1929 [Deft.'s Ex. 5], adopted by the Local Legislative Body of the City of New York). In other words, individual officials and not the city were charged with the duties mentioned.

While it might not have been necessary to substitute the Sanitary Commission for the Commissioner of Street Cleaning, if the latter had been made a party originally when the present action was begun, we know of no reason why when the Charter plainly prescribed that the duty of disposing of garbage was *upon the Commissioner of Street Cleaning*, he should not have been made a party, if the argument is to prevail that action on the part of the defendant can be compelled *in personam* through the coercing of some of its officials who are not parties to the suit. In this respect we submit that a municipal corporation differs from a private corporation.

(2) The character of the case is such that the controversy is not justiciable.

The Special Master found, as we have heretofore stated, that the controversy was justiciable under Article III, Section II of the Constitution (R. Sp. M., pages 9, 59). That section provides in part:

> "The judicial Power shall extend to all Cases in Law and Equity * * * to controversies between two or more States; * * * between a State and citizens of another State * * *. In all cases * * * in which a State shall be a party, the Supreme Court shall have original jurisdiction."

It is not every case, however, which, just because it involves a sovereign State as plaintiff and a citizen of another State as defendant, is justiciable under this provision, even though it may apparently be so in form.

New Jersey v. *Sargent*, 269 U. S., 328.

Therein the Court stated in discussing its authority to decide a question between a State and a citizen under said Constitutional provision (page 331):

> "But according to the course of proceeding under this head in equity, in order to entitle the party to a remedy, a case must be presented appropriate for the exercise of judicial power";

Earlier cases have more definitely discussed the question of jurisdiction under this head.

> *Cohens* v. *Virginia*, 6 Wheat., 264, 398-399;
> *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S., 265;
> *Massachusetts* v. *Mellon*, 262 U. S., 447, 480-481.

In the course of the opinion of the Court in *Wisconsin* v. *Pelican Insurance Co.*, *supra*, it is said (p. 289):

> "As to 'controversies between a State and citizens of another State'. The object of vesting in the courts of the United States jurisdiction of suits by one State against the citizens of another was to enable such controversies to be determined by a national tribunal, and thereby to avoid the partiality, or suspicion of partiality, which might exist if the plaintiff State were compelled to resort to the courts of the State of which the defendants were citizens. Federalist, No. 80; Chief Justice Jay, in *Chisholm* v. *Georgia*, 2 Dall., 419, 475; Story on the Constitution, Secs. 1638, 1682. The grant is of 'judicial power', and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one State, of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other State at all."

The above was quoted with approval in *Massachusetts* v. *Mellon, supra*, at pages 480-481.

It seems to us clear, therefore, under the previously cited authorities that the instant case relates to no controversy over which the courts of New York or the District Courts of the United States would have any jurisdiction because the tort had a local *situs* wholly outside its or their boundaries.

The courts of both the States of New Jersey and New York, as well as of other localities, have always held that they had no jurisdiction over such controversies.

Hill v. *Nelson*, 70 N. J. Law, 376 (57 Atl., 411);
Karr v. *N. Y. Jewell Filtration Company*, 78N. J. Law, 198 (73 Atl., 132);
Watts v. *Kinney*, 6 Hill (N. Y.), 82, 87;
People v. *Central Railroad of New Jersey*, 42 N. Y., 283 (Writ of Error dismissed, 12 Wall., 455);
Sprague National Bank v. *Erie R. R. Co.*, 40 App. Div., 69, 72 (Appeal dismissed 170 N. Y., 577);
Brisbane v. *Pennsylvania R. R. Co.*, 205 N. Y., 431, 434;
Allen v. *Connecticut River Lumber Co.*, 150 Mass., 560;
Ellenwood v. *Marietta Chair Co.*, 158 U. S., 105, 108.

The opinion of the Court in *People* v. *Central Railroad of New Jersey, supra*, contains some interesting statements.

The complaint prayed for the abatement, as nuisances, of certain pier enlargements extending out from the New Jersey Shore into the Hudson River and for an injunction in connection therewith. The Court of Appeals of New York held that it had no jurisdiction over the

subject matter of the action and that defendant's contention in relation thereto was not waived by its general appearance, and said (42 N. Y., at page 289):

> "The cause of action set forth in the complaint is clearly one of equitable cognizance; and as the jurisdiction of the Supreme Court is co-extensive with the boundaries of the State, it clearly had jurisdiction of such cause of action, if the place where the nuisances complained of were erected and existed was within the territorial limits of the State.
>
> It is quite clear, that upon no other ground have the courts of this State any power, either in equity, or by indictment and criminal proceedings, to abate a nuisance. The *locus in quo* must be within the legal limits of some county of the State, and the process for the abatement of such nuisance must go to the proper sheriff for execution, within the limits of his county."

The opinion also discusses the question of the boundary between the two States under the Treaty between them and what constitutes the shore of New Jersey (pages 290-299); and also the difficulty of enforcing any judgment such as was rendered in the lower court (page 306).

Recently, legislation has been adopted in New York making some of the New York cases cited above obsolete in respect to the bringing of actions in the State Courts for certain kinds of injuries to property lying outside the State.

See—

> Chapter 930, Section 1, Laws of 1920, adding Section 982-a to the Code of Civil Procedure, now Section 536 of the Real Property Law (Chap. 50 of the Consolidated Laws).

The section reads as follows:

> "§536. **Actions relating to Real Property situate without the State.** An action may be maintained in the courts of this state to recover damages for injuries to real estate situate without the state, or for breach of contract or of covenants relating thereto, whenever such an action could be maintained in relation to personal property without the state. The action must be tried in the county in which the parties or some one thereof resides, or if no party resides within the state, in any county."

This provision would, in our opinion, give the plaintiff no right to bring its equitable action, similar to the present suit, in the courts of New York State even if it cared to do so, because

> (1) It gives a right *to recover damages only* for injuries to extra territorial real estate;
>
> (2) It relates to a right to recover damages for injury to real property without the State, but not where the cause of the injury was the commission of an alleged nuisance wholly without the United States, i.e., on the high seas, beyond the three-mile limit.
>
> (3) The alleged injury in the instant case is not direct but consequential and the cause of action for an injury to real estate is joined with others for alleged injuries to navigation, fishing and bathing rights.

The fact that the plaintiff might be without remedy in the instant case, if we are correct in our arguments,

is no reason why the jurisdiction of this Court should be improperly extended to protect it.

In both of the New Jersey cases cited in the last group it was stated that the plaintiffs therein would doubtless have no remedy except by means of the actions then before the Court but the Court held that this fact did not affect the question and denied relief.

C. Plaintiff's failure to prove that the defendant dumped its garbage and refuse "into the navigable waters of United States."

Plaintiff makes this allegation in Paragraph "11" of the complaint. If it is an essential allegation of fact then its failure to prove such fact would be fatal to its cause of action. All of the following paragraphs of the complaint charging the commission of wrongs and nuisances on the part of the defendant against the plaintiff, refer to "said garbage and refuse." In other words, it is the garbage *there* dumped that is charged as being the nuisance and the results alleged are all dependent upon the allegations of paragraph 11 in this regard.

The Special Master made no specific finding on the subject. What can be inferred concerning the matter from the Master's finding at the end (page 41) of the section of his report designated "Some Questions of Law—1. Trespass", we do not know.

Plaintiff contended before the Master that the boundaries of the State of New Jersey extended three nautical miles seaward from the southern portion of a line drawn from Montauk Point, New York, to Cape May, New Jersey, beginning at a point thereon where it was intersected by the boundary line (extended) between New York and New Jersey. The Master found against this contention and against the claim of trespass, stating (page 41):

"I think the established rule of the common law should be accepted in determining the territorial limits of New Jersey in the soil under water and that its claim that the dumping of garbage is upon its property is not sustained."

The Special Master having made quotation on page 39 of his report, from the case of *Cunard Steamship Co.* v. *Mellon* (262 U. S., 100, 122) in support of his conclusion, we fail to appreciate why he avoided deciding the more important question and concentrated on the less important.

The case just referred to was a decision relating to the territorial jurisdiction *of the United States* as being its land area and the three-mile belt of water extending around the same.

We contend, therefore, that the allegations of paragraph "11" of the complaint, relating to the place of dumping of garbage and refuse, were material and essential to the cause of action which the plaintiff has chosen to plead; that such allegations amount to a mixed statement of fact and law, and so far as the fact was not proved nor found, that there was a fatal variance between pleading and proof (which revealed that dumping was at the points found by the Master) for which the complaint should have been and should now be dismissed.

That the language of the allegation was deliberately chosen by the plaintiff is evident from the fact that it contended before the Special Master that the defendant's acts constituted a trespass upon the plaintiff's property (R.Sp.M., pp. 36-41). It could not have made that contention unless the dumping was within the territorial limits of New Jersey, and so of the United States. It was certainly

necessary to allege where the dumping took place, and the plaintiff chose to allege that fact in a particular manner. The defendant must have relied on the manner of the allegation as stating the locality, and that it was erroneous in fact, for otherwise it would not have controverted the same simply by a denal in the original answer. Hence, we see that the allegation of the place of dumping being essential and not having been proved as alleged, there was a fatal variance, since proofs must correspond with allegations.

Jones v. *Morehead*, 1 Wall., 155, 165;
Rubber Company v. *Goodyear*, 9 Wall., 788, 793;
Burton v. *United States*, 196 U. S., 283;
Brightson v. *Claflin Company*, 180 N. Y., 76, 81.

In *Burton* v. *United States, supra*, Burton (a senator) was indicted and tried in the Eastern District of Missouri for violation of Section 1782 of the Revised Statutes, for rendering services before a department of the government to a corporation in connection with a matter in which the United States was interested. The indictment charged payment to Burton at St. Louis, Missouri. The proof was that he was paid in Washington. It was held that there was a total lack of evidence to sustain certain counts in the indictment, and the Court said (page 304):

> "The court should have, therefore, directed a verdict of not guilty on these counts."

To sum up the Special Master should not have made the findings objected to in the exceptions above referred to. In regard to the other exceptions of Group I, we will point out briefly our objections thereto in Appendix B to this brief, setting forth the exceptions in order.

II.

The Master erred in his findings of fact and conclusions of law to the effect that garbage and refuse in large quantities, dumped by the defendant in the Atlantic Ocean more than a marine league from the shores and waters of the plaintiff, are driven and carried by the winds and waters to and upon the beaches of the plaintiff and its adjacent waters, thus creating a public nuisance, to the great injury of the plaintiff's rights and property.

These alleged errors are called to the attention of this Court in a group of exceptions by the defendant under Section "B," numbered 12-43, inclusive. We refer at this time especially to exceptions 18-23, inclusive, 33 and 41-43, inclusive, the latter being failures to find defendant's proposed finding of fact 60, and to make defendant's requested proposed conclusions of law 17-19.

Exception 18 is to the conclusion (R. Sp. M., p. 27) at the end of the finding of fact "(16) Appearance and Movement," that large parts of these floating and submerged areas of garbage and refuse, *dumped by the defendant*, are driven and carried by the winds and water to and upon the shores of the plaintiff, etc.

Exception 19 is to the conclusion (R. Sp. M., p. 41) at the end of the section entitled, "1. Trespass," to the effect that such deposits of garbage so reaching plaintiff's waters and shores, "do great injury to fishing and bathing in such waters."

Exception 20 is to the conclusion (R. Sp. M., pp. 50-51), in the section entitled, "3. Nuisance," to the effect that the conditions charged in the complaint as due to the defendant's acts are, in fact and in law, produced by the defendant.

Exception 21 is to the conclusion (R. Sp. M., p. 53) in the section entitled "3. Nuisance," that the conditions described as produced by the defendant amount to a public nuisance, which plaintiff, and the communities affected, should not be required to tolerate.

Exception 22 is to the conclusion (R. Sp. M., pp. 56-57) that even if strict proof is required from the plaintiff, the conditions produced upon plaintiff's beaches and in its waters by the garbage, are attributable to the defendant, and that the invasions of plaintiff's rights are of serious magnitude and threaten to continue for an indefinite period.

Exception 23 is to the conclusion (R. Sp. M., p. 59), in the section entitled, "6. Jurisdiction," that defendant continues to produce a public nuisance on plaintiff's beaches, as aforesaid, and that the plaintiff is entitled to relief in accordance with the prayer of the bill.

Exception 33 is to the failure of the Master to find defendant's proposed finding of fact 60, to the effect that defendant has not caused the injuries and damages charged against it by the plaintiff in its complaint, especially in regard to injury to property values and retardation of economic development of plaintiff's municipalities, nor has defendant caused plaintiff and its municipalities great expense for the removal of garbage.

Exception 41 is to the failure to make defendant's proposed conclusion of law 18, to the effect that plaintiff must prove its claims by clear and convincing evidence.

Exception 42 is to the failure to make defendant's proposed conclusion of law 19, to the effect that plaintiff has failed to prove its claims by clear and convincing evidence.

Exception 43 is to the failure to make defendant's conclusion of law 17, to the effect that defendant's acts have

not created a public nuisance, as charged by the plaintiff, especially in respect to the health, safety, and welfare of plaintiff and its citizens.

A. The Special Master erred in failing to find that the plaintiff must prove its case by clear and convincing evidence and in finding that even if such rule applied conditions on plaintiff's beaches and in its waters were due to defendant's acts.

Questions raised by exceptions, Nos. 22, 41, and 42, relating to the matter of strict proof, will receive attention first. The Special Master, quoting from *Georgia v. Tennessee Copper Co.*, 206 U. S., 230 (R. Sp. M., p. 54), did not seem to think that the strict proof rule was applicable in suits between a state and a municipal corporation of another state, but that even if it were the plaintiff had complied with it and defendant was liable (R. Sp. M., pp. 56-57). We submit that the defendant was entitled to explicit findings as requested and not to the qualified concession.

The situation in the last cited case is utterly remote from situation here. There the State was seeking to enjoin the acts of a *private corporation* which was endeavoring to maintain its profits rather than install devices which would protect the rights and property of the State of Georgia and its citizens from serious injury or destruction. Here, we have a great municipality—an agent of a sovereign state—engaged in a work of necessity for the preservation of the health of its citizens and sojourners (thousands of whom come daily from the State of New Jersey to participate in the advantages it offers). As such state agent performing governmental functions it is entitled, we submit, to invoke the rule of proof required of the planiitiff in an action between sovereign states. That the City of New York is a mere agent of the

State for executing governmental powers and duties in the locality where it is situated was found by the Special Master (R. Sp. M., p. 55).

He also found that the defendant was "given the right and duty of performing a function that may be called governmental" (R. Sp. M., p. 56). This is in accord with most authorities.

> *Harris* v. *District of Columbia*, 256 U. S., 650;
> *Condict* v. *New Jersey*, 46 N. J. Law, 157;
> *Haley* v. *City of Boston*, 191 Mass., 291.

In the *Harris* case, *supra*, the plaintiff brought an action against the defendant for injuries caused by one of its employees while engaged in sprinkling the streets. It was held that common law principles applied in the District of Columbia and that (p. 652):

> "But nothing else appearing, we are of the opinion that, when sweeping the streets, a municipality is exercising its discretionary powers to protect public health and comfort and is not performing a special corporate or municipal duty to keep them in repair."

(This is an important case in view of the fact that the plaintiff herein is invoking common law principles to sustain a recovery.)

So far as the present action is concerned, the parties would seem to stand, therefore, in the same situation as if the State of New York were defendant and had been attacked for performing some act for the benefit of the health of its citizens and objected to by the State of New Jersey.

The rule in regard to the quality of proof required before an injunction will be ordered at the behest of one

State in an action against another is enunciated in the cases of:

Missouri v. *Illinois*, 200 U. S., 496;
New York v. *New Jersey*, 256 U. S., 296, 309;
North Dakota v. *Minnesota*, 263 U. S., 365, 374;
Connecticut v. *Massachusetts*, 282 U. S. (Adv. Op. 75 L. Ed. 297, 302).

It is said in the course of the opinion of this Court in the famous case of *Missouri* v. *Illinois, supra*, at page 521:

> "But it does not follow that every matter which would warrant a resort to equity by one citizen against another in the same jurisdiction equally would warrant an interference by this court with the action of a State * * *.
>
> Before this court ought to intervene the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side."

This Court has even gone so far as to hold that in an action between individuals to abate an alleged nuisance (consisting of a bridge and its piers in a navigable river—the Mississippi) the same must appear beyond a reasonable doubt. It is so stated in headnote 16 to the case of

Mississippi and Missouri Railroad Co. v. *Ward*, 2 Black 485.

> "Another rule is that the bridge must appear plainly to be a nuisance before it can be so decreed;

since a Court of Equity, proceeding by bill, like a Criminal Court trying an indictment, must give the benefit of all reasonable doubts to the defendant."

The authorities being as above cited we contend that the defendant should have had the strict proof rule applied to the plaintiff and that under it the latter was not entitled to the findings and conclusions to which we have taken exceptions 13-23, above mentioned, and some others to be mentioned.

(1) Weakness of the plaintiff's evidence in regard to the dropped bottles.

Generally speaking, the evidence of the plaintiff may be divided into two main categories:

1. (a) Returned postal cards deposited in bottles dropped in the garbage as it was dumped in the ocean.

(b) Oral testimony as to things seen, found, smelt, etc.

(c) Articles picked up on the beach and photographs of conditions.

(d) Official United States Government reports.

2. Other reports and letters containing opinions of a more or less expert character and oral hearsay.

While there were occasional objections to testimony which were only sometimes sustained, almost everything offered was received. Much of the oral testimony of plaintiff's witnesses as to conditions at the beaches consisted besides the observations of the witnesses, of "complaints" made to them by others.

Concerning evidence relating to the returned postal cards deposited in bottles dropped in the garbage as it was being dumped from the defendant's scows or immediately thereafter, defendant has excepted (exception 15) to so much of the Master's finding (page 26) as finds that about 25% of the self-addressed stamped postal cards deposited in sealed bottles dropped in garbage in the ocean immediately after dumping by New York City scows came back to the parties depositing same by mail from persons along the New Jersey and Long Island shores and from further north.

The testimony in respect to this matter came from plaintiff's witness Smack employed to make investigations (Pr. A. 20) who testified that he and companions had made 34 trips to the dumping grounds (Pr. A. 7).

On fourteen of these trips they got close to the scows that were dumping and Smack deposited on each of the fourteen occasions twelve self-addressed cards in bottles in the garbage that had just been dumped (Pr. A. 7). One of these cards dropped on July 2, 1929, postmarked as mailed September 18th, 1928 (evidently a typographical error for 1929), was received in evidence as Plaintiff's Exhibit 2. There was no further testimony offered in regard to this card as to who found it or where it was found, except that plaintiff's counsel produced it as one of a number alleged to have been received by the witness through the mails but all of those which the witness had with him at the time he was testifying happened to have come "from the people over in New York, or along Long Island Sound who got the garbage (Pr. A. 8).

The witness testified that he received from finders from various Long Island, New Jersey and New England beaches 61 cards by mail. How many from each locality and when received was not stated. Bottles dropped near the shore usually reach there some time (see testimony

as to postal from bottle deposited in the lower bay of New York found at Ocean Grove, New Jersey, and returned in 1926 to the Chief Engineer of the Board of Estimate and Apportionment of The City of New York—Pr. A. 87). Only two of these returned postal cards were offered or received in evidence. Why not more if Smack had them? Perhaps the reason is to be found in the character of the testimony of the witnesses who did testify as to finding the bottles and cards.

The witness testified, however, that he had a group which came from residents of New Jersey (S. M. 23, Pr. A. 8). Be that as it may, only two other cards alleged to have been dr[illegible]d by Smack were offered in evidence. The first of these two was plaintiff's witness, Walter Roe, a painter from Monmouth Beach (Pr. A. 79). He testified that on the 4th or 5th of June, 1929, he picked up a bottle on Monmouth Beach with a card in it; that he did not mail the card to Smack, however, until the 10th of June (Pr. A. 80); that the stamped date on it was June 2 (date of deposit?), 1929 (Pr. A. 80); that garbage was all around on the beach where the bottle was picked up (Pr. A. 80).

On cross examination the witness testified that he was employed by the Central Railroad of New Jersey in the summertime and in the Quartermaster's Department of the Army at Fort Monmouth in the winter, firing the furnace (Pr. A. 81). The card (Pltf.'s Ex. 44) appears to have been postmarked June 12th, although the witness put his name and address to it on June 10th (Pr. A. 81). His explanation as to why he held the card so long after the date on which it was found (June 4th or 5th) is as follows (Pr. A. 81):

> "Well, if I happened to have went away the day after and I couldn't get back—I was painting on the

railroad and I was off for a couple of days—three days.

I was away for three or four days between the time I found it and the time I filled it out and when I came back I filled it out."

The second witness who stated that he found a card in a bottle was named James Durkin, who lived at Northwest Asbury Park (Pr. A. 412). He was a handyman for a real estate man (Pr. A. 413). The bottle was found amidst the garbage on the beach, and the witness put the date when he found it on the card, which he thought was June 4th. It appears to have been the 7th of June, not the 4th, and it was mailed according to the date on June 12th, 1929 (Pr. A. 413).

The similarity in the stories of these two witnesses is striking. Each thought he found his bottle on June 4th, 1929. Yet each mailed his card to Smack on June 12th, 1929, according to the postmarks. Each kept his card a number of days before mailing it. Why these apparently unintelligent witnesses should have been interested in these bottles and picked them out from garbage on the beach was not brought out. Enough does appear, however, to make their testimony of weak credibility. Not only is the proof sought to be deduced from the alleged finding of these two cards rendered somewhat dubious but so is that in respect to the other 59 from miscellaneous sources *not* produced. Durkin's card was given Plaintiff's Exhibit No. 262.

(2) Weakness of the proof that garbage, the dumping of which from city scows was actually seen, ever reached plaintiff's shores.

Whether garbage which had been observed as having been dumped from the scows of The City of New York

reached the shore, the testimony was far from positive. There is not the slightest doubt, of course, that great quantities of garbage did come ashore at times The question was whether it came from New York City scows. The most convincing testimony to throw a doubt on the contention that most of the garbage came to the plaintiff's beaches from defendant's scows was elecited from plaintiff's own witnesses and was to the effect that during the long period of more than 20 years (1896-1918) when defendant dumped no garbage at sea (except for a couple of months in 1906) garbage conditions on the New Jersey beaches were thoroughly bad, Seven witnesses so testified as follows:

B. Y. Patterson (Pr. A. 125). I live at Spring Lake. I was born there. I have lived there ever since. My business is real estate and insurance. I have always observed the garbage on the beach * * * (Pr. A. 126). I do not know what effect it has upon my business. We have always had it.

John W. Flock (Pr. A. 345). I have held the official position of Beach Commissioner between 1912 and 1920, Commissioner of Parks and Public Property (of Long Branch) * * *. During all that time that I was Commissioner, some form of refuse, or garbage, came in on our beach; more or less all the time, and sometimes worse than others. * * * These conditions prevailed there the entire time that I served as Commissioner of Parks and Public Places, I would say; not all the time as bad as others; sometimes a great deal worse. When the wind was northeast, why, we got lots of it * * * (Pr. A. 346). We employed those men to go to work on the beach in 1912, as I stated before, and that was their duty every morning, from that year and right up until the time I resigned from the Board of Commissioners.

Edward Combs (Pr. A. 358). I live in Manasquan. I am a laborer now in a cold storage; formerly I was a

fisherman. I fished for 35 years, up until 4 years ago. I did pound fishing. I have always seen plenty of garbage.

H. S. Ward (Pr. A. 414). I live at Point Pleasant Beach, New Jersey * * * (Pr. A. 417). But the garbage condition has been existing as long as I can remember. And I have been on the coast all my life.

D. Hubert Chester (Pr. A. 434). I have been coming to Asbury Park for 25 years. I am an engineer * * *. Quite a number of years ago, some 20 years ago, I was living at Point Pleasant in the summer and we had a storm there that brought all kinds of garbage.

J. Lyle Kinmouth (Pr. A. 440). I am the publisher of a newspaper, the Asbury Park Press. I have published the paper between 24 and 35 years. During all of that time, practically, I have been in Asbury Park. I have been Beach Commissioner of Asbury Park from 1903 to 1905, when they took over the property from Mr. Bradley * * * (Pr. A. 444). I am not familiar with pollution of the beaches prior to 1905. Since that time it has been going on.

Frank J. Bock (Pr. A. 496). I live in Newark, New Jersey. I am the post-master * * *. I own an apartment at Deal, directly on the ocean front. * * * I spend the summers at Deal. I have spent, oh, probably 40 years along the (Pr. A. 497) coast,—not at Deal all the time * * *. I am familiar with the garbage on the beach. My observations have covered practically from Avon up to Elberon. I have been familiar with that during the past 40 years. There has not been any improvement in conditions.

Taken in connection with testimony as to garbage and refuse coming from other sources than the defendant's scows—to which we shall refer later—we submit that the correctness of the Master's findings as to defendant's responsibility is not free from doubt. Such being the case

we submit that defendant was entitled to its proposed finding of fact 64 to the effect that from 1896 to 1918, except for a few months in 1903 (1906), no New York C[illegible] garbage and only a part of its refuse was dumped s[illegible] yet during that period a large amount of garbage an[illegible]fuse was washed up into the New Jersey waters and on its Atlantic shore-front beaches, and consequently that exception No. 67 is good and should be sustained.

Whether there was convincing testimony that any of the plaintiff's witnesses had actually followed garbage they had seen dumped from dumping ground to shore, we submit the following testimony. It came from Smack and some of the lobster fishermen.

Smack testified that (Pr. A. 15):

> "Most of the time we went out, we caught a wind from the south, which carried it in the direction of the Long Island shore."

Further on (Pr. A. 17) we find this testimony from Smack:

> "In a northeast wind the garbage flows ahead of that wind toward the shore.
>
> I have seen it go to the shore.
>
> I have seen it work to the north, for instance, ahead of the wind from the south, and the wind cut across it from the northeast, and definitely the garbage would change its course and drift ahead of that northeast wind toward the shore."

Again (Pr. A. 17) Smack testified as follows:

> "I have seen them (islands of garbage) float very definitely toward the shore repeatedly, and I have

seen them follow the definite trial to the point where they deposited some quantity at Sandy Hook, yes."

On cross examination Smack, in answer to a question as to how far and how long he trailed the garbage he saw dumped, testified in this evasive manner (Pr. A. 24):

> "I have trailed the garbage that I saw dumped on one of these dates in a definite line right to the beach. The point at which the dumping was done was approximately 20 miles southeast by east of the Scotland Light, and the beach was 4 miles, approximately from the light.
>
> We moved right along with a definite line of garbage to that point."

. . . . . .

> The period of time during which I stayed with and traced the course and direction of the garbage (Pr. A. 24) was "Approximately 4½ hours."

He also testified that at such time the wind was blowing slightly south of east at the rate of 30 miles an hour (Pr. A. 24); that the boat was moving under its own power at less than half speed (Pr. A. 24).

Lars Peterson, a lobster fisherman, testified that dumping took place 18 miles off shore and that the floating garbage moved with the tide and wind but "mostly it's the tide" (Pr. A. 50). He also testified (Pr. A. 51):

> "I am able to say that garbage that was dumped from the scows came right in on the beach at Monmouth Beach."

In regard to whether he ever made any test as to whether garbage he saw actually dumped drifted in shore,

he gave this illuminating evidence on cross examination and we take it from the stenographer's minutes as we are permitted to do under the stipulation (S. M., pp. 204-205; Pr. A. 52):

"Q. So that you never did drift with the garbage? A. Drift with the garbage, no.

Q. You never did? A. Never drift with the garbage, no, because we use power.

Q. And you were going to and from a place for the purpose of managing your pots? A. Yes.

Q. And you never did make any of these trips for the purpose of testing the course of the garbage? A. Yes, I did, many times.

Q. Who told you to test the course of the garbage? A. What?

Q. Who told you to test the course of the garbage? A. I didn't get that question.

Mr. Crowe, read it to him (question read). A. Nobody did.

Q. What was your reason then for testing the course taken by the garbage? A. I didn't test it."

Anton Holgarson, another lobster fisherman, testified on direct examination as follows (Pr. A. 53):

"I have seen the garbage drift on the surface of the sea.

It drifts with the tide. If there is no wind, the tide will take it wherever the tide runs. If the tide runs from the east, it will bring it right clean into the beach.

I have never followed the garbage into the shore itself, but I have run through it all the way into the beach."

Carl Holgarson, another lobster fisherman, testified on direct examination (Pr. A. 55, 56):

> "These garbage areas drift with the tide mostly, because I have drifted with it.
>
> I have drifted with this garbage to the shore. Sometimes to the shore and sometimes off shore, sometimes north and sometimes south.
>
> I have never followed drifts of this garbage all the way to the shore in coming home on the drift.
>
> At different times I have seen it closer a little bit, at different times farther south; sometimes a mile off, sometimes ten miles off."

It was the idea of this witness that 15 miles out at sea there was no regular tide; that it ran in one direction for two or three days. His lobster pots were out 18 to 20 miles and when he fished with gill nets he sometimes drifted for 12 hours and would travel at the most 7 miles (Pr. A. 57).

Gustave Holgarson was a fisherman. He testified (Pr. A. 82-83) on direct examination that he sailed back and forth fishing each day and had followed garbage into the shore. He did not testify that this was garbage he had seen dumped.

M. Hall was another fisherman who accompanied Smack (Pr. A. 117). On direct examination he testified in regard to following the garbage (Pr. A. 119):

> "I have followed the garbage in the ocean in toward the shore, sometimes for an hour—over an hour.
>
> I couldn't tell at what rate of speed I was going—about 7 miles."

Another lobster fisherman was August Popp. He testified (Pr. A. 350):

"I have never seen this material in the water all the way from the place where it was dumped into the shore."

In view of this testimony we submit that the Master erred (see Exception 14) in finding as a fact that (R. Sp. M., p. 26) some of the lobster fishermen have followed the floating garbage from the place where it was dumped by the defendant to where it went ashore.

The plaintiff also called Wilbur H. Conover, a "master of steam vessels" for 32 years, coast-wise pilot and captain of the Parker Runyon, the boat of the Board of Commerce and Navigation of the State of New Jersey in 1923 (Pr. A. 492). At Governor Silzer's request he followed the New York City garbage scows on one occasion to a point 15 miles south by east of Scotland Lightship and watched the tow through glasses go out five miles farther and dump (Pr. A. 492-493). During the war the witness was 16 months on the coast. He then gave this testimony (Pr. A. 493):

"I have encountered the garbage at sea; no great quantity of it, but different fields of it at times, in the very course of the coastal navigation.

I have never seen the garbage moving from the dumping grounds towards the shore. I have went through it, of course, between the dumping ground and the shore."

There were other lobstermen who testified to the effect that they had followed the garbage from the dumping ground to the shore, but these men could not identify the scows from which garbage was dumped. They simply assumed that it was New York City's garbage from the place it came or from the amount of it.

After defendant's witnesses had testified, plaintiff put Deputy Inspector Haas of the New York Harbor Supervisors Office on the stand. He had investigated the dumping of garbage at sea by The City of New York in February, March and April, 1929, making six trips to do so under orders to follow the drift for 24 hours if possible (Pr. A. 636). Buoys were placed at the time and point of dumping and after drifting two hours then another was set and then one every two hours thereafter (Pr. A. 636). On March 1st a tow of three scows dumped 8 miles southeast of Scotland Lightship. After 24 hours drifting the garbage was 9 miles off Long Beach, L. I., N. Y. (Pr. A. 637). The second trip was on March 19th. The dumping point was 8 miles southeast of the lightship or 12 miles from the New Jersey shore. After 12 hours the wind and sea was so high that the test had to be abandoned, the garbage dumped having traveled on a big sweep about 14 miles to the whistle buoy 3 miles from the Long Beach shore (Pr. A. 637). Another trip was taken on February 25-26, 1929. The dump was made at the 8-mile location. After 17 hours the test had to be abandoned as the wind at that time was blowing 35 miles an hour from the east and the garbage was headed for the New Jersey shore traveling at about a mile an hour and was about six miles therefrom (Pr. A. 637-638). On March 11th a trip was made which lasted 24 hours. The dumping took place at the 8-mile point and at the end of the 24-hour period the garbage was headed out to sea (Pr A. 638). On February 22nd a 24-hour test was made and the garbage had traveled 18 miles from the dumping point mostly to the eastward (Pr. A. 638). The last trip was made on April 4th, the dumping place being the 12-mile point. The garbage was followed for 24 hours and it drifted 8 or 10 miles, mostly northerly and easterly

(Pr. A. 638-639). The witness testified that there was only one occasion when there was "a possible chance of garbage reaching the New Jersey shore" and that was when the witness had left it 6 miles therefrom drifting in that direction with the wind behind it (Pr. A. 639).

So, here, we have an investigation made with considerable care by an impartial, intelligent witness in the employ of the United States Government and yet he could give no proof that as a result of his investigation New York City's garbage did reach New Jersey waters or shores.

At no time did the garbage travel more than a mile an hour even when a thirty-five mile an hour wind was blowing. If this witness is to be believed (and there is no reason why he should not be), it would have been simply impossible for the lobster men or Smack, who saw dumping take place around the 20-mile point, to have drifted with garbage to the beach in from seven to ten hours. While garbage may have occurred *at intervals* all the way to the beach, the lobster men *never drifted with what they saw dumped all the way to shore* and neither could Smack or others running at half speed or less, follow such garbage from the dumping point to the shore.

In view of the testimony of Inspector Haas we submit that the defendant was entitled to have the Master find (see Exception 24), as requested by defendant (Proposed finding of fact 46) that six different inspections made by an official of the office of the U. S. Supervisor of the Harbor of New York in February, March and April, 1929, of garbage dumpings by New York City scows at the 8 and 12 miles dumping points where the drift of garbage was followed for from 12 to 24 hours each did not reveal a single occasion when the garbage reached any shore.

The finding on page 25 of the Master's report was incomplete and did not give a true picture of the investigation by Haas.

In addition to this, defendant's witnesses Gainard, Lawrence and Bergsten made trips to sea to follow garbage dumped by New York City scows and each of them testified that on none of the three occasions when they went out did the garbage reach any shore. They are all pilots and coastwise ship captains (Pr. A. 547, 581, 614). The first trip was on January 30, 1930, to the 12-mile dump. The wind was blowing 20 to 30 miles an hour from the east to northeast with a rough sea which beat up the material that floated until only about 10% was left, five hours after dumping. During that time the floating material had drifted about 10 miles outward and about 14 miles from land. It could not be identified after that and as it was snowing, the boat put back (Pr. A. 547-550, 581-582, 616-617). The second trip was made on February 1 and 2 to the 12-mile dump and the garbage was observed for 18 hours. At that time what was left had drifted about 2½ miles from the point of deposit (Pr. A. 550-551, 618). The third trip was on February 29 to the 8-mile dump. This garbage was followed for 17 hours when only about 5 to 10% was left floating headed in an easterly direction (Pr. A. 551-552, 582-583).

(3) The plaintiff's proof was weakened by the absence of expert evidence to counteract testimony as to the influence of the tides in retarding garbage dumped ten to twenty miles from the plaintiff's beaches from reaching the same.

We think that in a case like the present it was somewhat striking that there was no expert evidence whatever on the subject of the tides off the New Jersey coast

and the effect thereon of garbage dumped into the ocean 10 to 22 miles from the shore. Assuming that high winds would overcome the effect of the tides if they blew in one direction long enough we have the specific evidence of plaintiff's lobstermen witnesses that the tide exerted a greater influence than the wind or at least at times when the wind was not blowing much.

Smack stated that everything that floats on the surface of the water is not affected in any appreciable degree by the tides when the wind is blowing hard (Pr. A. 25) and that the wind would affect the water to a depth of 18 feet (Pr. A. 25). Schweitzer, a lobster fisherman, testified that the tide seems to keep "the stuff" clear of the Highlands (Pr. A. 43). Lars Peterson, a lobster fisherman, testified that "mostly it is the tide that causes" the garbage to drift into shore (Pr. A. 50). And Anton Holgarson, a lobster fisherman, said, "If there is no wind, the tide will take it wherever the tide runs" (Pr. A. 53). Carl Holgarson, another lobster man, testified (Pr. A. 55): "These garbage areas drift with the tide mostly." C. A. Francis (Pr. A. 501), a resident of Long Branch for 57 years, a former State Senator, etc., testified (Pr. A. 503): "The tide brings it in." More such testimony might be found.

There is also evidence in the record to the effect that the garbage dumped by The City of New York had to cross two tides in order to reach the shores of New Jersey.

In a letter from J. C. Fremont, Supervisor of the Harbor of New York (to Governor Silzer), dated May 31, 1924, read into evidence by the plaintiff (Pr. A. 458-459) appears the following in respect to the farthest point at sea at which the scows can dump with safety (Pr. A. 459):

"This position is 20 miles east of the nearest point on the New Jersey coast, and any floating refuse to reach that point would have to cross at least two tides."

Plaintiff's Exhibit 257 is the report of a conference held September 19, 1923, of the Anti-Pollution League of America. Capt. P. M. Olmstead, Supervisor of New York Harbor at that time stated thereat:

"If the garbage comes back, there are two tides a day it must cross. It will take a passage of two days for that to float ashore. There is no place off New York where there is a two-knot tide not until you get into the Narrows. To cross sixteen miles it would have to cross two flood and two ebb tides to get into the beach. When wind is blowing on shore for 3 or 4 days, the surface current may run toward shore, and possibly some garbage does get in; that is a question which we have not decided yet."

In a letter from Governor Silzer of New Jersey to Secretary of War Weeks, dated June 19, 1925, read into the record verbatim, we find the following (Pr. A. 465):

"It is an admitted fact that if garbage is dumped far enough at sea, the outgoing tides will prevent it from being dumped ashore."

In view of this and to the facts to which we shall refer hereafter concerning the dumping of garbage by others than New York City scows much nearer the beach than its garbage was dumped, we submit that the defendant was entitled to proposed finding of fact 65, the master's re-

fusal to find which forms the subject of our Exception 34 to the effect that the plaintiff failed to produce on the trial of the action any scientific or expert evidence as to the effect of ocean currents or tides upon the movement of floating or partially submerged objects dumped into the sea 10 to 22 miles off the shore of New Jersey. Absence of such testimony certainly weakens any conclusion that the defendant is responsible for the conditions sometimes existing on plaintiff's beaches and in its waters.

III.

The Master erred in finding that compliance by the defendant in respect to the locality in which its garbage was dumped with permits issued by the Supervisor of the Harbor of New York under authority of the Act of Congress of June 25, 1888 (25 Stats., 209) as amended (Title 33, Chapter 9, Sections 441-451, U. S. Code), does not relieve the defendant from the effect of the public nuisance resulting from and created by said dumping.

The pertinent sections of the statute are 441 and 443, U. S. Code, which have been set forth in full on pages 44 and 45 of the report of the Special Master and will not be repeated here or in the appendix of this brief relating to statutes.

Section 451 of the Code, however, in regard to the appointment of the supervisor might well be set forth herein.

"§451. Supervisor of harbor; appointment and duties. A line officer of the Navy shall be designated by the President of the United States as supervisor

of the harbor, to act under the direction of the Secretary of War in enforcing the foregoing provisions of this chapter, §§441 to 449, inc., and in detecting offenders against the same. This officer shall have personal charge and supervision under the Secretary of War, and shall direct the patrol boats and other means to detect and bring to punishment offenders against the provisions of said sections."

The Master found that defendant dumped its garbage at points 8, 10 and 20 miles outside of the Scotland Light-ship and 10, 12½ and 22 miles from the shore of New Jersey in accordance with permits issued by said supervisor (R. Sp. M., pp. 20, 43, 46) but the Master also found that such fact constituted no defense to the defendant nor did it relieve the City from liability for the nuisance resulting from or created by its actions (R. Sp. M., p. 49). To this finding defendant has excepted (Defendant's Exception 49) as well as to a group of subsidiary findings and to the refusal of the Special Master to conclude as a matter of law (Exception 50) as requested by defendant that dumping by it under such circumstances amounts to a compliance with every requirement of Congress on the subject of navigation, commerce, etc.

The Master also charged the defendant with inconsistency in claiming the protection of the permits and yet asserting that the appointed places for dumping were not within the navigable waters of the United States (R. Sp. M., p. 57). We do not quite follow the Special Master here. We are not contending that Congress may not exercise jurisdiction over matters affecting American citizens beyond the 3-mile limit. It has done so in many ways in matters relating, for instance, to admiralty jurisdiction and in respect to the enforcement of the prohibition and revenue laws. (*Maul* v. *United States*, 274 U. S., 501, 511.) Apparently Congress has given

the supervisor certain discretion as to the exercise of his powers under 25 Stats., 209, as amended, beyond such limit. Waters "adjacent" to New York Harbor is an elastic term. Rather than enter into a controversy with the supervisor in regard to the place of dumping, defendant requested permits and abode by the supervisor's rulings in respect to place. Our position is that if the supervisor has any power or jurisdiction over the matter of our dumping, we comply with the statute and with his requirements, but that before we can be prevented from dumping at places beyond the 3-mile limit there must be further legislation if we do not violate the supervisor's requirements and the provisions of the Anti-Dumping statute.

IV.

The Master erred in finding that such garbage and refuse as reaches the plaintiff's shores from the dumpings by coastwise and other vessels and from other sources, is negligible in comparison with that dumped by defendant and reaching plaintiff's shores.

Under the heading in his report "Some Issues of Fact" (R. Sp. M., 30-36), the Special Master set forth some of the evidence on which defendant relied under its second defense, to the effect that in view of the dumping of a great deal of garbage and refuse by others nearer shore than that dumped by the defendant it could not be determined whether New York's garbage reached the plaintiff's shores. *But although the Master commented upon the fact that there was some evidence to support the defendant's contentions as to the other sources of pollution than defendant's scows, he failed to make any findings of fact in relation thereto.*

The Master's statement of the evidence as to the average number of coastwise vessels entering and clearing from New York City for points south is given on page 31 of the report. Most of the dumping is done from vessels leaving and these averaged about twenty a day. Why the Special Master recited that there was an estimate of a witness when there were the figures from the official reports also given on page 31 of the report, which bear out the "estimate" we do not know. On page 32 of the report the Master, after stating that some vessels which provide for their crews in port and do not dispose of their garbage and refuse there (as some do), finds that a majority of the lines operating out of New York southward did not accumulate garbage or other refuse matter, but make arrangements for its disposal while in port. The basis for this finding, if it be one, was the testimony for the plaintiff of William Park, Superintendent of the Clyde and Mallory Lines (Pr. A. 641). He testified (Pr. A. 642) that their line had three times as many sailings as any of the other lines, but that there were "a lot of freight ships" besides; that they did not feed their crews in port and (Pr. A. 643) that on their regular line they got in one day and sailed the next and that (Pr. A. 644) he had "not been on freighters very much."

The other witness for defendant on this subject was Harry P. Snow, Chief Officer of the Steamship "George Washington" (Pr. A. 645). He testified that his company (Eastern Steamship Lines), served meals to the crews while in port, which was 22 to 48 hours (Pr. A. 646) and the amount of garbage accumulated depended on the number of men in the crew. With ninety therein they accumulated 2 or 3 ten gallon cans which is dumped at sea below Shrewsbury Buoy, three miles off shore, and some of it is eaten by gulls. That he has sailed (Pr. A. 647)

through areas of garbage a couple of hundred feet in extent, which could come from vessels but did not, in his opinion, because it was all fruit skins which could not all come from steamships. In their refuse (Pr. A. 648) would be milk cans, sardine cans, ketchup bottles and mayonnaise bottles.

The witness also testified (Pr. A. 647-8) that he has seen in passing piles of "dunnage" (hold sweepings, refuse, etc.), piled on decks of foreign vessels for dumping at sea.

It is quite evident that both of these witnesses were testifying about passenger line conditions and not about freightships as were plaintiff's witnesses referred to by the Master on page 32 of his report. These witnesses had for many years been ship masters and coastal pilots. The first was Captain Gainard (Pr. A. 547). He testified as to the quantities and kinds of material dumped as hold, galley and crew quarters' sweepings, dunnage, wood, fruit, mattresses, pillows, shoes, old clothes, the remains of food left after meals, electric light bulbs, bottles, cans, etc., all dumped after passing the lightship (Pr. A. 554-555). He also testified that boxes, barrels and other containers with the names and addresses of New York City dealers thereon, when opened and the provisions constituting the ship's food stores removed, were put aside and later dumped with the other refuse (Pr. A. 556). In all of this he was corroborated by defendant's witness Capt. Lawrence (Pr. A. 584, 585). Defendant's witness Capt. Bergsten also gave somewhat similar testimony (Pr. A. 614-616).

Gainard also testified that ships held up by fog outside the harbor entrance, often for 24 to 48 hours, dumped garbage and refuse where anchored (Pr. A. 556). The annual report of the supervisor of the Harbor of New

York for 1929, introduced in evidence by the plaintiff as Exhibit 335, at page 2081 stated (Pr. A. 541-542):

> "It is probable that a great deal of garbage is dumped at or inside the harbor entrance by the enormous tonnage passing in and out of New York, and also that the local floating equipment throws more or less garbage overboard."

The same statement appeared in several other annual reports of the Harbor Supervisor prior to that of 1929, which plaintiff introduced in evidence. Governor Silzer of New Jersey, recognized this (Pr. A. 461), although he believed that it also came from New York. (Letter of June 24, 1924, from him to Harbor Supervisor Fremont.)

Harbor Supervisor Anderson testified that dumping permits were issued

> "to contracting companies that desire to dispose of what we call 'cellar dirt' which is debris from buildings that have been taken down. For example, when the Waldorf Astoria Hotel was torn down, the contractor deposited that material at sea under permit from my office" (Pr. A. 537).

This cellar dirt has in it according to Supervisor Anderson (Pr. A. 545), joists, timbers, laths and plaster of a very light kind.

Sewage was deposited in the waters of the Atlantic Ocean less than a quarter of a mile from the beaches of Long Branch and Asbury Park. This came from defective sewage disposal plants of those cities which was objected to by the New Jersey State Board of Health (Pr. A. 612-614, 619, 653, Deft.'s Exs. 9, 10—especially at pp. 16, 31-33—11 and 14).

All this is minimized by the Master on pages 34 and 35 of his report. For instance as to the pollution of the water adjacent to the beach at Long Branch by the defective sewer objected to by the State Department of Health, he states:

> "The evidence consists of a plan of the sewage system and some evidence that complaints were at one time made to the Department of Health which investigated the same; and that the matters were satisfactorily adjusted."

The facts are, as appears from Defendant's Exhibit 9, that the State Board of Health of New Jersey adopted three resolutions on September 14, 1926, the first of which directed the Long Branch Sewer Company to "cease to pollute the waters of the Atlantic Ocean being waters of this State, by allowing and permitting insufficiently treated sewage to be discharged from the sewer treatment plant of the said company, located in the City of Long Branch." The second and third resolutions approved plans and specifications of the company for improvements and extensions in the system and the installation of a new treatment plant which was to be finished and in operation June 15, 1927. Further facts about this sewer system are set forth in Defendant's Exhibit 10.

There is no testimony or documentary evidence whatever in the record as to the installation of these improvements or their approval by the State Board of Health. Counsel for the plaintiff promised to produce resolutions from that body showing the same but did not do so (Pr. A. 664-666). Defendant has excepted to the finding of fact in this matter above quoted (No. 82) and it should be allowed.

As to Asbury Park's defective sewers, is it fair to accept without hesitation defendant's rebuttal testimony

(R. Sp. M., p. 35) that conditions relating to the discharge of vegetable matter, fruit peelings and other objectionable objects from the outlet 1,000 feet off shore, discovered by defendant's witness Worthing in March, 1930 (Pr. A. 612-13) was due to the annual tank cleaning through opening of the blow off gates, in view of the fact that the State Department of Health has brought an action to restrain the City (Defendant's Exhibit 11) from discharging into the ocean inadequately treated sewage? Consequently we say that the uncontroverted evidence being such as it is we are entitled to findings instead of mere recitals of evidence and that our exceptions Nos. 52, 55, 56, 57, 58, 59, 60, 62, 63, 64, 65, 66, 68 and 69 should be granted.

The fundamental basis for the opinion and supporting testimony of many of plaintiff's witnesses to the effect that the garbage or most of it, found on plaintiff's beaches and in its adjacent waters came from deposits thereof in the ocean by defendant's scows, is the *amount* thereof and the New York addresses on letters, papers of various kinds, theatre ticket stubs, milk bottle tops, boxes, etc.

Frederick Bailey, coast guard at Avon since July, 1925 (Pr. A. 129), was typical of such witnesses. He testified (Pr. A. 131) that the garbage came from New York City because there was too much to come from passing vessels. "It is the quantity that is the basis of my judgment as to the origin of the garbage. That is my opinion."

There was other testimony to the same effect. Now whether the inference is good or not it remains that *it is an inference*. The same may be said concerning all of the papers, bottles, boxes, etc., with New York City addresses thereon. It is *inferred* that they are part of the garbage and refuse dumped from City scows because at one time or another these papers must have been in New York or originated there. Yet we find testimony from some of plaintiff's most intelligent witnesses that a

very large majority of the summer hotel population, of various seashore resorts, comes from New York City.

Harry Duffield, President of the Asbury Park Hotel Keepers Association and for 25 years previous to occupying that office Secretary of the Association (Pr. A. 421), testified (Pr. A. 422): "The patronage of Asbury Park hotels that comes from New York and Brooklyn amounts to 70%."

Sidney H. Rhodes, a merchant of New York with a summer home in Deal (Pr. A. 363), testified (Pr. A. 364): "Approximately 80% of the summer residents of our community are residents of New York—people who live in New York in other seasons of the year."

A great deal of similar testimony might be found. If inferences are to be indulged in, it surely is as fair to suppose that many of the check stubs, bill heads, letters, theatre checks, etc., were dropped by such summer residents on the beach as to suppose that they all come from New York City refuse deposits, to say nothing of materials dumped from passing steamships.

Then again there are the picnickers on the beach. Efforts have been made to control these people by ordinances and the placing of containers, etc., not altogether successfully.

Joseph Mayer, Mayor of Belmar (Pr. A. 254), testified as to picnicking on the beach (Pr. A. 260): "We have always been troubled with it. There is always somebody who will go down and start picnicking and that is the source of trouble."

Frank C. Borden, Jr., Mayor of Bradley Beach since 1919 (Pr. A. 174), testified (Pr. A. 177): "That on *August 1, 1929*, a tag system for residents was established to exclude outsiders. We have not room on our beachfront, even with a mile of frontage, to take care of our summer people—summer visitors and the day visitors who come for bathing and bring their lunches and so on;

we had no room for them so that we had to stop lunch parties on our beach."

Evidently up to the time of the commencement of this action lunch parties were pretty common on the beaches. It is, of course, more than a possibility that they were in the habit of leaving some of the kind of things on the beach that have been picked up therefrom with New York addresses on them.

Many communities employ men to clean the beaches daily and not only after storms and east winds under which conditions garbage usually reaches the shore.

M. E. Snyder, General Superintendent of the Ocean Grove Camp Meeting Association, a religious organization (Pr. A. 57), testified (Pr. A. 63): "We have men whose sole duty it is to clean the beach every morning, and they do it after the picnickers and the bathers."

Frank Durand, Mayor of Sea Girt (Pr. A. 164), testified (Pr. A. 165): "In our immediate bathing beach, where the beach would be used ordinarily every day, we require our life guards to clean the beach every morning." There is much other testimony to the same effect from plaintiff's witnesses as to the daily cleaning of beaches.

The testimony of Harbor Supervisor Anderson also must not be forgotten (Pr. A. 546) that paper and such like porus material has a tendency to become waterlogged and sink after an indefinite period of submersion. We say, therefore, that it is an inference that most of the refuse with New York addresses thereon picked up on plaintiff's beaches is water borne and that it is another inference that such refuse is dumped from the City sewers. It is a well known rule of evidence that an inference may not be based upon an inference.

United States v. *Ross*, 92 U. S., 281, 283;
Mannig v. *Insurance Company*, 100 U. S., 693, 696;

Chicago, Mil. & St. P. Ry. v. Compton, 171 U. S., 472, 477;

Lamb v. Union Railway Co., 135 N. Y., [illegible] 208.

A chain is only as strong as its weakest link. If clear and convincing evidence that garbage and refuse in general, dumped by the defendant in the ocean did not reach New Jersey's waters and beaches, [illegible] the appearance of scows and odiferous [illegible] will not supply the basic deficiency.

V.

The Master erred in his findings and conclusions that the defendant has delayed for an unreasonably long time in erecting incinerators to dispose of its garbage.

Such findings and conclusions are set forth under the sub-heading in the Master's Report "(17) Incinerators," especially on page 20, and also on page 22, last paragraph.

This last-mentioned finding states, in substance, that the first incinerating-plant was erected by the City of New York in February, 1896; while on page 20 it is stated that it was in such year—five years after defendant began dumping at sea—that the first incinerator was put into operation, and that those subsequently constructed fall far short of taking care of the garbage and refuse situation; that the apparent delay in adopting the proper method of disposition is not explained and has been unreasonably long.

Exceptions Nos. 70, 71 and 72 have been taken to these

findings. Other exceptions to the Master's refusal to find and conclude, as requested by defendant in this connection, will be noted below.

Apparently the Master was under some misapprehension as to the different borough divisions into which the City of New York is divided by statute, although the appropriate sections of the Greater New York Charter were called to his attention. By Chapter 378 of the Laws of 1897 (Greater New York Charter), various localities were combined and consolidated under one city government, known as Greater New York, and subdivided into the Boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond (See Appendix "A" of this brief). It was the first Borough of Manhattan incinerator (not City of New York) that was installed in February, 1924.

Edward P. Greene, Superintendent of Final Disposition in the old Department of Street Cleaning, and since December 1, 1929, in the Department of Sanitation, and connected with the work since 1894 (Pr. A. 564), gave uncontradicted evidence that (Pr. A. 572) neither the Boroughs of Queens nor Richmond had ever sent any of their garbage to sea, and that in the Borough of Queens there were now nine incinerators, while Dr. Schroeder, Commission of Sanitation, testified (Pr. A. 593) that there were three incinerators in Richmond. In other words, the garbage from these two boroughs has never been dumped at sea, but was incinerated.

The official records of the Department of Street Cleaning of The City of New York setting forth the monthly collections of the number of cubic yards of garbage from 1924 to 1929, inclusive, for the Boroughs of Manhattan, The Bronx and Brooklyn and the number of cubic yards dumped at sea from said boroughs, Defendant's Exhibit 12 (these being the only boroughs from which garbage was disposed of at sea during that period—with the per-

centages of the amount dumped to the amount collected) is as follows:

YEAR	AMOUNT COLLECTED (from 3 boroughs only)	AMOUNT DUMPED AT SEA	APPROXIMATE PERCENTAGE
1924	1,837,970	1,675,657	.91
1925	1,812,251	1,517,934	.83 2/10
1926	1,969,752	1,303,119	.69-6/10
1927	1,782,299	1,219,416	.68-4/10
1928	1,955,818	1,378,572	.70
1929	2,519,758	1,478,165	.58-7/10

Greene testified, also (Pr. A. 573), that of the garbage collected by the entire city, throughout all of its five boroughs, only about 27% was, by the end of 1929, being dumped at sea. (It is alleged in the complaint, paragraph "11", that the City's population increases at the rate of about 136,000 a year.) With none of the garbage collected from the three boroughs of Queens, Richmond and Brooklyn (since December 1, 1929), being dumped at sea, there is no reason whatever to doubt Greene's testimony—certainly in the absence of contradiction—as to the percentage of city garbage collected that is dumped. In other words, 73% is incinerated. Plans for the establishment of at least one incinerator on the Manhattan waterfront were enjoined by the New York Courts (Pr. A. 570; *McCarthy* v. *Mills*, 214 App. Div., (N. Y.), 70). Another site had to be abandoned on account of legal difficulties (Pr. A. 571).

We submit, taking all things into consideration, that the defendant is not chargeable with unreasonable delay in the erection of these expensive plants, costing around a million dollars apiece, excluding the value of the sites (Pr. A. 569). Instead, we allege that the Master committed error, as urged in the findings referred to in Exceptions 70-72 and in his failure and refusal to find the

facts and conclusions mentioned in Exceptions 69, 73, 74, 75, 76, 77, 78, and 79.

We further urge that the Master erred in his refusal to find and conclude as requested by defendant in Exceptions 84, 85, 86, 88 and 89. The matters referred to in those exceptions which we asked the Master to find, are set forth in New York Statutes (Appendix "A"), and why the Master should have declined to find and conclude as requested, we do not know.

VI.

The Master erred in finding that on all of the evidence, a case for equitable relief in favor of the plaintiff was made out.

The conclusion of the Master in this regard is found at the end of the Section of the brief entitled, "Some Questions of Law—6. Jurisdiction" (R. Sp. M., p. 59).

We once more set forth at this point a quotation from the case of *Missouri* v. *Illinois*, 200 U. S., 496, heretofore cited, where the application for an injunction to prevent the alleged pollution of the Mississippi River by the City of Chicago Drainage Canal was denied (p. 521):

> "Before this Court ought to intervene, the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the Court is prepared deliberately to maintain against all considerations on the other side."

Now, while the recommendation of the Master is that the injunction to be allowed is not to take effect immediately, but only after a reasonable time for the erection of additional incinerators to be determined

further hearings before a Special Master (R. Sp. M., pp. 59-60), the unforeseen difficulties which may easily arise through opposition by people of the neighborhoods adjacent to the sites of the proposed incinerators, or otherwise, after a time has been fixed by the Court for their construction, leads the defendant to oppose the confirmation of the report for that reason, among others.

A. Complete failure of proof by plaintiff as to loss of property or rental values in its seashore communities.

We ask if it has been proved that the damage and detriment to New Jersey and its shore communities is as great as the hotel-keepers, municipal officials, some of the summer residents, and fishermen, would have the Court believe.

It is true that the Master (R. Sp. M., p. 16) found that the garbage tends to injure business, and property values, and rental values; that it is dangerous to leave children unattended on the beach, and that people have cut their feet severely on broken bottles and nails in pieces of wood. We have heretofore urged that the proof was not clear and convincing, that these bottles and pieces of wood, and things picked up by children, came from garbage and refuse dumped from city scows. In addition, and especially in regard to the depreciation of values, we wish to call attention to the kind of evidence on which these findings are based. *Almost all of it is just ordinary opinion based on complaints and statements made to the witnesses.* It needs the citation of no authorities to substantiate the claim that such is not the method of proving depreciation of property or loss of rental value. Not a single witness testified that his property had remained vacant after prospective tenants refused to rent the same when they came to make inquiries on days when there was garbage on the beach. The course of sales or rentals in the communities was not given. The witnesses were not

qualified as real estate experts and their knowledge of values was not shown.

Below is a compilation of the statements of some of the witnesses for the plaintiff in regard to these matters. In setting it forth we do not wish to be understood as claiming that there are not stronger statements of opinion to be found in the record, to the effect that the garbage hurt the hotel business and property values and the rental of bath-houses, but we do say that such stronger statements are simply based on complaints and are not clear and convincing evidence.

James Hurley has been in the real estate business at Ocean Grove for fourteen years, and has seen garbage conditions once or twice a year. Complaints come in from his clients (Pr. A. 70):

> "It don't have any effect on my business * * *. So far as interferring with the business is concerned, it doesn't interfere."

B. Y. Patterson (Pr. A. 125), lives at Spring Lake and was born there. His business is real estate and insurance. He testified (Pr. A. 126):

> "What effect it has on the development of our community, I have no way of telling. I don't know what effect it has upon my business. We have always had it. I don't know what effect it has 'til we get rid of it."

Arthur Kenneth Graham, Chemical Engineer, living at Seagirt and Philadelphia (Pr. A. 199):

> "As to the development of Seagirt, I know there are a great many people who come there who object to the fact that the garbage is there, and when it is very noticeable, almost everybody will remark about

it, and from that point of view I dare say there is a serious objection" (Pr. A. 220).

Edward L. Mix, Photographer, living in New York City in the Winter and at Belmar, N. J., in the Summer. One of his patrons who used to go to Belmar told him the conditions on the beach were so horrible that they would have to leave the place (Pr. A. 209):

> "Probably hundreds of thousands come to our beach in the summertime—last summer—and out of hundreds of thousands of people who went there, only one said they would not go back that I know of specially" (Pr. A. 210).

Horatio Clayton, Spring Lake real estate agent and insurance man (Pr. A. 248):

> "It has a decidedly bad effect upon the development of the community" (Pr. A. 249).

Joseph Mayer, Mayor of Belmar (Pr. A. 254):

> "There is not any question that the question of garbage on the beach is a serious detriment to our town * * * but the principal effect seems to come from the complaints from the hotels" (Pr. A. 257).

The same witness testified:

> "So it became more serious each year. In other words, the towns were getting more people and greater numbers were coming to the beach and the resort, so that the garbage became more and more of a question of consideration with all officials and principally our own" (Pr. A. 256).

ANTHONY E. WICKHAM, Mayor of Seaside Park (Pr. A. 273):

"The effect that all of this has upon our community is a general depression of the property there, and holding the town back in general, by people keeping away from there" (Pr. A. 275).

"The assessed valuation of ratables in the borough is $2,600,000 this year. Last year it was $2,000,000 and about $400,000" (Pr. A. 274).

JAMES E. JONES, Mayor of Long Branch (Pr. A. 313):

"I do not think there is any question that the garbage on the beach is a retardation of development of theocean front property" (Pr. A. 313).

JOHN W. FLOCK, Funeral Director, Long Branch (Pr. A. 343):

"What effect the garbage has upon the development of our community is hard to say; what the community would have been if we had not had this garbage" (Pr. A. 344).

WALTER H. JARDEN lives at Philadelphia in the Winter and at Mantoloking in the Summer (Pr. A. 351):

"What effect it (garbage) has upon our community I do not know how to measure the effect upon the community * * *. This garbage is a matter of common complaint in the neighborhood" (Pr. A. 352).

Mrs. Walter H. James, Wife of preceding witness:

"We bought in Mantoloking after one month's residence there, and did not realize the conditions, and if we had to do it again, I am quite sure we would go to south Jersey, where the beaches are cleaner and sanitary for children" (Pr. A. 353).

William B. Kirsch, Long Branch real estate man (Pr. A. 358):

"• • • I have had any number of people tell me if the condition was not removed they would go elsewhere" (Pr. A. 359).

John J. Kiernan, real estate man, living in Long Branch (Pr. A. 391):

"In the real estate business, it hurts us to this extent: when we look for renewals of leases for the coming year the people say, 'I guess we will have to cut it out this year, Mr. Kiernan, because we did not have much luck last year, and we had a few little accidents, and things like that" (Pr. A. 392-393).

J. Wesley Seaman, Civil Engineer, Long Branch (Pr. A. 396):

"I do not know what effect this recurrence of garbage upon our beaches has upon our community, the beach development and growth. Of course, we do not have the visitors there that we should have, people go to other places" (Pr. A. 397).

H. S. Ward, Relator, Point Pleasant Beach (Pr. A. 414):

"* * * One of my clients informed me that they would not be back next Summer, unless there was a remedy obtained along the beach that would make it possible for them to enjoy the water" (Pr. A. 415).

Thomas A. Mathis, State Senator from Ocean County (Pr. A. 475):

"The garbage at times makes bathing almost impossible, and as bathing is one of the particular pastimes of our resorts, when the bathing is affected it affects the hotel business, the real estate business and all business in a general way" (Pr. A. 477).

Frank J. Bock, Postmaster, Newark, N. J., and owns an apartment at Deal, where he spends his summers (Pr. A. 496):

"The garbage has a very detrimental effect upon shore development. I had an apartment at Deal, and I know this, that when people come to look at the apartments with a view of renting them, if they happen to strike the development during the course of an east wind, the impression is very bad, and sometimes people, while they may not say so directly, have referred to the unsightly and unsanitary condition of the beach, and it deters them from locating there" (Pr. A. 497).

In view of this testimony we say that the Master erred in refusing to find the defendant's proposed finding of fact 60, as set forth in Exception 33.

B. Counterbalancing evidence for defendant of the Summer popularity, growth of the communities and investments therein and increase in assessed values during the years while defendant is charged with fouling plaintiff's beaches and waters.

On the other hand there cannot be the slightest doubt but that there has been a very great *development of the seashore communities* in the past ten years. Here is some of the evidence on the subject from plaintiff's witnesses:

JOHN F. MURRAY (Pr. A. 107), Director of Public Works of Newark, N. J., with summer home at Belmar for past 10 years testified:

> "(Pr. A. 109). It (Belmar), has developed moderately, kept pace with the times down there. I wouldn't say that particularly within the last three years it has made greater strides than in any other period of time. I would say that the development has been gradual then, in some years."

FREDERICK N. REISCHEY (Pr. A. 126), a resident for 14 years of Bradley Beach and City Clerk:

> "(Pr. A. 128). We have a public bathing beach. Because of overcrowding conditions, during the past years particularly, it was necessary for the governing body to put into effect a tag system whereby they would accommodate the residents of Bradley Beach and their guests only."

C. ALVA BOND, JR. (Pr. A. 171), has lived at Sea Girt for 18 or 19 years past in the summer. He is in the real estate business and is City Clerk. Has lived there the year around since 1923:

> "(Pr. A. 173). I have been engaged in the real estate business in Sea Girt (599) since 1924; values

have risen rapidly during that period until 1926 and since then they have been rather dormant."

Frank C. Bonnen, Jr. (Pr. A. 174), Mayor of Bradley Beach since May, 1919, has lived there since April, 1914:

"(Pr. A. 177). We have not room on our beach front, even with a mile frontage, to take care of our summer people—summer visitors and the day visitors who come for the bathing, and bring lunches, and so on; we had not room for them so that we had to stop lunch parties on our beach."

Joseph R. Mecoll (Pr. A. 178), lawyer living at Bradley Beach since September, 1916, and borough solicitor:

"(Pr. A. 180). Our community has had a very rapid development within the past five years. Bradley Beach has grown quite some."

Mrs. Margaret D. Pyle (Pr. A. 279), has lived in Allenhurst for 25 years and had been borough clerk for the past six years:

"(Pr. A. 280). For boardwalks and jetties we spent $275,000 on everything within the last four or five years."

And again:

"(Pr. A. 282). I have been Borough Clerk for six years. I testified that the assessed value of property in our borough is now approximately $6,000,000. That is the valuation on which the state and county taxes are apportioned. I think the assessed valuation was around $3,000,000 when I first became Borough Clerk."

Ralph Bodine (Pr. A. 418), lives at Point Pleasant Beach and has a United Cigar Store agency and general store:

> "(Pr. A. 419). We have a settlement on the north end of Point Pleasant, near what is called the inlet section * * *. It was owned by the River and Ocean Front Land Company. I suppose they owned half a mile or so of beach front, and they gradually kept coming there building these small buildings until now I should say there is nearly 200."

John G. Gaudineer (Pr. A. 437), Beach Superintendent of the City of Asbury Park since 1918, but has been on the beaches for 25 years:

> "The city has spent for jetties $1,516,400. This includes this contemplated new jetty at Fourth Avenue, which has already been authorized and is in course of construction. The city has spent for board walks $250,000; the valuation of boardwalks is at present $250,000; and we have an additional $210,000 appropriated right now to widen that boardwalk to the extent of 60 feet, to the ultimate width of 60 feet."

C. E. F. Heyrick (Pr. A. 377), Mayor of Asbury Park since January, 1915:

> "The resident population of Asbury Park the last census was 1,500. Approximated now between 18,000 and 20,000."

Again at Pr. A. 381:

> "In our program of development, however, I might say this, that our beach development, our park pro-

> gress, our schools, and all that, also leads up to a secondary development, which is more or less of a private nature; but each year they take a part in promoting, that is, the hotel sections, which were asked in here (indicating on photograph) (1186), in the next 5 or 10 years, probably $25,000,000 or $35,000,000 in apartment hotels. That is all planned and being brought to a culmination."

Anthony Wickham (Pr. A. 273), living at Seaside Park for the last ten years and now Mayor of the borough:

> "The winter population (Pr. A. 274), is about 500; the summer population is over 5,000. Our population is almost entirely a summer (878) population. The assessed valuation of ratables in the borough is $2,600,000 this year. Last year it was $2,000,000 and about $400,000."

Frank Durand (Pr. A. 164), Mayor of Sea Girt for the past four years, and living in Sea Girt since May, 1921:

> "Pr. A. 168). I have been the Mayor of Sea Girt for four years * * *. During that time, as I understand the testimony of Mr. Roberts, the community has made quite rapid strides."

People flock to these resorts in summer for the day, week and month and especially over the week-ends. Many photographs introduced in evidence by the plaintiff show this and so do the train schedules (Pltf.'s Exs. 58-65). Yet, this is the period of the year when the

greatest dumping on the part of New York City occurs (Deft.'s Ex. 12). The findings of the Master set forth some of the great differences between winter and summer populations of the various communities (R. Sp. M., p. 11). Yet on page 12 of his report he cites some figures of the decline of railroad passenger traffic of people coming to Asbury Park on excursions from 1924 to 1929. It can hardly be that he sought to convey the impression that fewer people have been coming to Asbury Park in the last few years, for Edith W. McConnell, City Director of Information of Asbury Park (Pr. A. 429), testified (Pr. A. 431):

> "For the last three years, the excursions have been coming into Asbury Park in bus loads * * *. It is also a matter of common knowledge that the automobile has cut into railroad passenger very heavily for several years past."

In view of all the above we ask this Court to overrule the Master's refusal to find defendants proposed findings of fact 61 and 62 to which refusals we have taken exceptions Nos. 80 and 81.

Cannot we find the real basis for this suit in the testimony of the witnesses from Asbury Park? Let us examine the evidence given by Mayor Hetrick for the plaintiff (Pr. A. 378):

> "For many years we have provided a city appropriation for direct advertising, which includes newspapers, magazines, and all the adjuncts of advertising. In addition to that, we provide a band; in addition to that, an orchestra. We have a baby parade, and functions of the type of a carnival. It

has all come under the advertising funds of the city, and the approximate amount in the last four or five years is probably $600,000. This year our direct advertising fund has been doubled, which is in addition to the other expenditures that will take place."

Asbury Park also maintains a publicity bureau (Pr. A. 389). T. F. Burley, Executive Secretary of the Asbury Park Chamber of Commerce, testified (Pr. A. 426) that the Chamber took care of municipal advertising, promotional activities relating to carnivals, conventions and baby parades. In reference to getting people to come to Asbury Park, he testified as follows (Pr. A. 426-427):

> "We offer them as an inducement an immaculate beach.
>
> You have had good descriptions of what we deliver. It finds me and the Asbury Park Chamber of Commerce in an embarrassing position."

Again we have this admission from the witness (Pr. A. 428):

> "We spend money to get the people and after we get the people, we cannot produce the thing we had promised them to produce; clean, healthy, wholesome bathing."

Attention is called to Plaintiff's Exhibits 267-272, inclusive, being folders issued by the Publicity Bureau of Asbury Park substantiating the testimony of the witness concerning the claim made for wonderful beach conditions at Asbury Park, which, according to the witness, *do not exist*. The testimony of this witness comes pretty close to an admission of dishonest advertising. No wonder the Chamber of Commerce is "embarrassed."

Mayor Hetrick testified (Pr. 3, 289) that he had been engaged for some time in a campaign to get rid of this garbage. One does not have to be informed with the wisdom of Solomon to see in all of these activities of the Anti-Pollution League, the Legislature and governors of New Jersey and the officers of other coast municipalities, the deft hand and brain of Mayor Hetrick and the Asbury Park Chamber of Commerce.

We, therefore, urge that the Master erred in his refusal to conclude as a matter of law (proposed Conclusion of Law 21) that the plaintiff had failed to prove facts sufficient to constitute a cause of action in equity for the relief demanded in the complaint or for any relief (Defendant's Exception 91), and erred in failing to conclude as a matter of law (proposed Conclusion of Law 22) that the defendant was entitled to a dismissal of the complaint (Defendant's Exception 92).

We also urge that the Master erred in the recommendations for a decree and that Defendant's Exceptions 93 and 94 to such recommendations be sustained.

About twenty-five years ago this Court had before it the case of

California Reduction Company v. Sanitary Works, 199 U. S. 306.

That suit was brought to restrain the defendants from removing from the City or depositing at any other place than the plaintiff's works the garbage specified in an ordinance of the Board of Supervisors of San Francisco. The lower courts granted the relief requested and the order was affirmed by this Court. On page 320 the opinion states:

"Many of the questions involved in municipal sanitation have proved difficult of solution. There is no

mode of disposing of garbage and refuse matter, as found in cities of dense populations which is universally followed."

And again at page 321 of the opinion it is stated:

"These references to the different methods employed to dispose of garbage and refuse have been made in order to show that the board had before them a most difficult problem—unsolved by experience or science as to the best or most appropriate method of protecting the public health in the matter of the disposal of the garbage, refuse and other materials found on private premises, and in hotels, restaurants and like places. The State, charged with the duty of safeguarding the health of its people, committed the subject to the wisdom and discretion of the Board of Supervisors."

These observations may not be as true today as they were then, for doubtless progress has been made in the business of garbage disposal since the opinion was written but the problem as a problem is many times magnified in a city as large as New York in comparison with the San Francisco of those days and we ask the Court to take that fact into consideration. It may seem to the plaintiff that we have been slow in accomplishing the results aimed at judging from the standpoint of private business activities, but we are dealing here with a matter of governmental administration which, unfortunately, is never as fast moving as are the activities of ordinary commercial life. This also we ask the Court to consider.

CONCLUSION.

The findings and conclusions of the Special Master should be overruled; the proposed findings of fact and conclusions of law of the defendant approved; the recommendations of the Special Master for a decree should be disregarded and a decree should be entered dismissing the bill of complaint.

Respectfully submitted,

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APPENDIX A.

Laws of New York (State and City).

Greater New York Charter (Laws of 1897, Chap. 378, as amended).

"SECTION 1. All the municipal and public corporations and parts of municipal and public corporations, including cities, villages, towns and school districts, but not including counties, within the following territory, to wit: The county of Kings, the county of Richmond, the city of Long Island City, the towns of Newtown, Flushing and Jamaica, and that part of the former town of Hempstead as it existed on the thirty-first day of December, eighteen hundred and ninety-seven, bounded on the east and north by the east and north bounds of the former village of Far Rockaway, and on the east by a line drawn due north from the northwest corner of said village to the south line of the town of Jamaica, as it existed on the thirty-first day of December, eighteen hundred and ninety-seven, are hereby annexed to, united and consolidated with the municipal corporation known as the mayor, aldermen and commonalty of the city of New York, to be hereafter called 'The City of New York;' and the boundaries, jurisdictions and powers of the said city of New York herein constituted, are for all purposes of local administration and government, hereby declared to be co-extensive with the territory above described; and the said city of New York is hereby declared to be the successor corporation in law and in fact of all the municipal and public corporations united and consolidated as aforesaid, with all their lawful rights and powers, and subject to all their lawful obligations, without diminution

or enlargement except as herein otherwise specifically provided."

"§2. The City of New York, as constituted by this act, is hereby divided into five boroughs to be designated respectively: Manhattan, The Bronx, Brooklyn, Queens and Richmond; the boundaries whereof shall be as follows:

First. The borough of Manhattan shall consist of all that portion of The City of New York, as hereby constituted, known as Manhattan Island, Nuttin or Governor's Island, Bedloe's Island, Rushing or Ellis Island, the Oyster Islands, and also Blackwell's Island, Randall's Island and Ward's Island in the East or Harlem Rivers.

Second. The borough of The Bronx shall consist of all that portion of The City of New York, as hereby constituted, lying northerly or easterly of the borough of Manhattan, between the Hudson river and the East river or Long Island sound, including the several islands belonging to the municipal corporation heretofore known as the mayor, aldermen and commonalty of the city of New York, not included in the borough of Manhattan.

Third. The borough of Brooklyn shall consist of that portion of The City of New York, as hereby constituted, hitherto known as the city of Brooklyn.

Fourth. The borough of Queens shall consist of the territory known as Queens county.

Fifth. The borough of Richmond shall consist of the territory known as Richmond county."

* * * * * * * * *

§96. There shall be the following administrative department in said city * * *:

Department of street cleaning * * *."

"§383. (As amended by Chap. 466 of the Laws of 1901.)

* * * * * * * * *

The presidents of the boroughs of Queens and Richmond shall, each for the borough of which he shall have been elected president, in addition to the powers above specified, have cognizance and control:

1. Of the sweeping and cleaning of the streets of the borough, and the removal or other disposition as often as the public health and the use of the streets may require, of ashes, street sweepings, garbage, and other light refuse and rubbish, and of the removal of snow and ice from leading thoroughfares and from such other streets as may be found practicable."

* * * * * * * * *

"§533. The head of the department of street cleaning shall be called the commissioner of street cleaning" * * *.

§534. The commissioner of street cleaning shall have cognizance and control:

1. Of the sweeping and cleaning, sprinkling, flushing or washing and sanding of the streets of the boroughs of Manhattan, the Bronx and Brooklyn, and of the removal or other disposition as often as the public health and the use of the streets may require, of ashes, street sweepings, garbage, and other light refuse and rubbish, and of the removal of snow and ice from leading thoroughfares and from such other streets within said boroughs as may be found practicable; and, as necessary, shall furnish scows or other suitable receptacles to remove or otherwise dispose

of, and shall remove or otherwise dispose of all ashes from the docks of Blackwell's and Randall's islands."

* * * * * * * * *

"§605-a [as added by Local Law No. 13 of 1929 duly passed by the local legislative body of the City of New York (Deft.'s Ex. No. 5)]:

"*Department of sanitation.* In order to more effectively promote and protect the public health and safety by central and uniform administration of the governmental activities embraced within this chapter, the department of sanitation is hereby established, the head of which shall be a sanitary commission, with the jurisdiction, powers and duties prescribed by this chapter."

§605-b [as added by said Local Law No. 13 of 1929]:

"*Sanitary commission.* The sanitary commission shall consist of three members to be appointed by the mayor. One of such members shall be a licensed physician or a person holding the degree of doctor of public health, and one of such members shall be an engineer duly licensed under the laws of the state of New York with at least five years' practical experience in sanitary engineering."

* * * * * * * * *

§605-d [as added by said Local Law No. 13 of 1929]:

"*Jurisdiction of sanitary commission.* On and after the date when this chapter takes effect, the sanitary commission shall have jurisdiction, charge and control:

2. Of the removal and disposition of ashes, street sweepings, garbage, refuse, rubbish and the bodies of animals;

4. Of the location, construction, operation, maintenance and use fo incinerators or other plants or equipment for the destruction or disposition of ashes, street sweepings, garbage, refuse, rubbish and dead animals"

City Home Rule Law (Laws of 1924, Chap. 363).

"§11. *Powers of cities to adopt and amend local laws.* 1. The local legislative body of a city shall have power to adopt and amend local laws in relation to the property, affairs or government of the city relating to the powers, duties, qualifications, number, mode of selection and removal, terms of office and compensation of all officers and employees of the city, the transaction of its business, the incurring of its obligations, the presentation, ascertainment and discharge of claims against it, the acquisition, care, management and use of its streets and property, the wages or salaries the hours of work or labor, and the protection, welfare and safety of persons employed by any contractor or subcontractor performing work, labor or services for it, the government and regulation of the conduct of its inhabitants and the protection of their property, safety and health."

United States Code, Title 33, Chapter 9 (relating to Oil Pollution Act).

"§433. *Prohibition against discharge of oil generally.* Except in case of emergency imperiling life or property, or unavoidable accident, collision, or

stranding, and except as otherwise permitted by regulations prescribed by the Secretary as hereinafter in this chapter, sections 434 to 437, inclusive, authorized, it shall be unlawful for any person to discharge, or suffer, or permit the discharge of oil by any method, means, or manner into or upon the coastal navigable waters of the United States from any vessel using oil as fuel for the generation of propulsion power, or any vessel carrying or having oil thereon in excess of that necessary for its lubricating requirements and such as may be required under the laws of the United States and the rules and regulations prescribed thereunder. The Secretary is authorized and empowered to prescribe regulations permitting the discharge of oil from vessels in such quantities, under such conditions, and at such times and places as in his opinion will not be deleterious to health or sea food, or a menace to navigation, or dangerous to persons or property engaged in commerce on such waters, and for the loading, handling, and unloading of oil." (June 7, 1924, c. 316 §6, 43 Stat. 606.)

APPENDIX B.

(Exceptions to Report of Master not specifically discussed in brief).

4. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 49) that The City of New York has not dumped garbage and refuse in the ocean for many years in any appreciable quantities within a marine league (three nautical miles) of the shores of the State of New Jersey, except on rare occasions either when necessary to preserve life where a scow was in danger of foundering or when there is some unauthorized action upon the part of the individuals employed by the contractors in charge of the scows or tow-boats.

The proof justified the finding (Deft.'s proposed finding of fact 49), especially in view of the Master's findings as to where dumping took place (R. Sp. M., p. 20). In view of statement in record by Counsel for N. J. that no complaint was being made against short dumping (Pr. A., p. xxiii), and Harbor Supervisor Anderson's testimony (Pr. A. 543, 630) the exception is justified.

5. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 50) that the territorial waters of the plaintiff do not extend more than one marine league or three nautical miles from the Atlantic Coast shore line of said State of New Jersey at low water mark.

The finding requested necessarily should follow from the Master's reasoning and conclusion (R. Sp. M., pp. 36-41) and therefore the exception is proper.

9. To the failure and refusal of the Special Master to conclude as a matter of law as requested by the defendant (Proposed Conclusion of Law 5) that the dumping in the Atlantic Ocean by the defendant of garbage and refuse for many years last past at the points and distances from Scotland Light Ship and from the New Jersey shore as stated in Exception No. 9, was not and is not a dumping thereof in the territorial waters of the State of New Jersey.

Same as last except this relates to a conclusion of law.

10. To the failure and refusal of the Special Master to conclude as a matter of law as requested by the defendant (Proposed Conclusion of Law 6) that the dumping in the Atlantic Ocean by the defendant of garbage and refuse for many years last past at the points and distances from Scotland Light Ship and from the New Jersey shore as stated in Exception No. 9, was a dumping thereof on and into the high seas.

Follows from last two exceptions.

12. To so much of Finding of Fact (16) (Report of Special Master, p. 25) as finds that such parts of the garbage or refuse as float either on the surface or in suspension in the water, move with the direction of the wind and current, the wind exercising the greater influence on the direction of its movement, and the mass moves at times westward and northward or towards the shores of New Jersey or Long Island according to the direction and velocity of the wind.

The Master's finding omits to take into account the influence of the tide. This was erroneous in view of testimony of intelligent fishermen referred to in brief. Exception therefore proper.

13. To so much of Finding of Fact (16) (Report of Special Master, p. 25) as finds that the mass spreads out on the surface of the water gradually breaking up into smaller areas and moving for indefinite periods with the wind, some of the materials being on the surface and some in suspension.

Exception proper for same reason as in connection with No. 12 above.

25. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 48) that when dumped, the lighter portion of the garbage floats while the heavier portion sinks, but that gradually some of that which at first floated, sinks, leaving a very considerably smaller portion floating at the end of 24 hours than at the time of dumping.

Proposed Finding of Fact 48 rests on testimony in the record (Pr. A. 17, 40, 50, 549-550, 553, 617, 629). It should have been found and the exception is proper.

26. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 52) that garbage and refuse dumped by the defendant into the ocean as aforesaid, has not found its way in any substantial quantities into the territorial waters or onto the beaches of the plaintiff.

This exception calls for a ruling as to the Master's refusals to find Proposed Findings of Fact, and 26, 36, 37, 38 and 39 to his refusals to make such conclusions of law as are therein set forth are based on the proposition generally that the plaintiff did not prove by clear and convincing evidence that defendant's garbage dumped far out at sea reached plaintiff's beaches in substantial amounts.

27. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 54) that the dumping of garbage and refuse at sea as aforesaid by defendant, has not caused substantial injury to the navigation of the ocean by the plaintiff or its citizens or visitors.

See notation under No. 26, *supra*.

28. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 55) that the dumping of garbage and refuse at sea as aforesaid by the defendant, has not caused any substantial injury to bathing or bathing rights or property connected therewith on the part of the plaintiff or any of its citizens or visitors.

See notation under No. 26, *supra*.

29. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 56) that the dumping of garbage and refuse at sea as aforesaid by the defendant, has not caused any substantial injury to fishing or

fishing rights or property used in connection therewith of plaintiff or its citizens or visitors.

See notation under No. 26, *supra*.

30. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 57) that the dumping of garbage and refuse at sea as aforesaid by the defendant, has not substantially injured or menaced and does not substantially injure or menace the health, safety, comfort or welfare of the State of New Jersey or any of its citizens or visitors thereto.

See notation under No. 26, *supra*.

31. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 58) that the dumping of garbage and refuse at sea as aforesaid by the defendant, has not caused any substantial injury to the commerce of the plaintiff or its citizens.

See notation under No. 26, *supra*.

35. To the failure and refusal of the Special Master to conclude as a Matter of Law as requested by the defendant (Proposed Conclusion of Law 7) that the dumping in the Atlantic Ocean by the defendant as aforesaid, of garbage and refuse, has not obstructed and does not obstruct or impede the navigation of the waters of the United States or of the State of New Jersey.

See notation under No. 26, *supra*.

Also hindrance to navigation of small motor boats of fishermen is unsubstantial, and permits to defendant from Harbor Supervisor took care of these complaints.

36. To the failure and refusal of the Special Master to conclude as a Matter of Law as requested by the defendant (Proposed Conclusion of Law 8) that the dumping in the Atlantic Ocean by the defendant as aforesaid, of garbage and refuse, has not injured or destroyed and does not injure or destroy the bathing or fishing rights or property therein of the plaintiff or its citizens or visitors thereto.

See notation under No. 26, *supra*.

37. To the failure and refusal of the Special Master to conclude as a Matter of Law as requested by the defendant (Proposed Conclusion of Law 9) that the dumping in the Atlantic Ocean by the defendant as aforesaid, of garbage and refuse, has not regulated or destroyed and does not regulate or destroy the commerce of the State of New Jersey and/or its citizens in violation of Article I, Section 8, paragraph 3 of the Constitution of the United States or of any statute of the United States.

See notation under No. 26, *supra*.

38. To the failure and refusal of the Special Master to conclude as a Matter of Law as requested by the defendant (Proposed Conclusion of Law 10) that the dumping in the Atlantic Ocean by the defendant as aforesaid of garbage and refuse, has not taken and does not take any property or right of

the plaintiff and/or its citizens, without due pro
of law in violation of Article XIV, Section 1 of
Constitution of the United States.

See notation under No. 26, *supra*.

39. To the failure and refusal of the Spe
Master to conclude as a Matter of Law as reque
by the defendant (Proposed Conclusion of Law
that the dumping in the Atlantic Ocean by the
fendant as aforesaid, of garbage and refuse, has
deprived and does not deprive the plaintiff and
any of its citizens of the natural advantages of
or their position along the seashore contrary to
soveraign rights of said State as a member of
Union or of any of such rights.

See notation under No. 26, *supra*.

44. To so much of the Finding of Fact set fo
under the heading "Some Questions of Law—2. P
mits" (Report of the Special Master, p. 45) as fin
that the Act (29 Stat. 209, as amended) con
plated that the Supervisor prescribe certain limi
but there is no evidence in this case as to what limi
were prescribed.

The limits were prescribed in the permits, some f
dumping at the 8 mile point, some at the 12 mile poi
and some at the 20 mile point, southeast of Scotla
Light Ship. Exception should therefore be sustaine

45. To so much of the Finding of Fact or Concl
sion of Law, or both, set forth under the headin
"Some Questions of Law—2. Permits": (Report
Special Master, p. 47) as finds, or purports to fin

that although the defendant dumps its garbage under permits issued by the Supervisor of the Harbor of New York at points in excess of one marine league from the shore of New Jersey, it is difficult to understand how that fact affords any defense in this case.

See argument in Point III of brief.

48. To so much of the Finding of Fact or Conclusion of Law, or both, as set forth under the heading "Some Questions of Law—2. Permits" (Report of Special Master, p. 48) as concludes that the fact that the defendant is a municipal corporation does not afford immunity from the results of its own action.

If the defendant is performing a governmental function authorized by law, as here, it is not liable for its acts if the injuries inflicted are consequential (*Transportation Co. v. Chicago*, 99 U. S., 635, 640).

53. To so much of the Finding of Fact or Conclusion of Law, or both, set forth under the heading "Some Questions of Fact" (Report of Special Master, p. 35) as finds or concludes that testimony that some vessels discharge garbage and refuse after clearing from New York, falls short of establishing a custom by other vessels.

The evidence (as recited in the brief on this matter reviewed on pp. 70-72) shows that *all* vessels discharged garbage and refuse, only some discharge small amounts.

83. To so much of the Finding of Fact set forth in the report of the Special Master under the heading "Some Conclusions of Law," page 50, as finds that

some scows have left upon them considerable quan
tities of garbage or refuse after their gates have been
thrown open to release the contents, and these rem
nants are cast off by the men in charge as the scows
are being taken back from the dumping area, and
that the general practice continues, more material
being dumped in 1929 than in the preceding year

In view of the statement of counsel for New Jersey
that complaint concerning short dumping was not being
made (Stipulation as to Record p. xxiii Printed Abstract)
the Master's finding in this regard should not have been
made. Furthermore, the amounts so dumped were un
substantial.

16. To so much of the Finding of Fact (7) (Re
port of Special Master, p. 16) as finds that the de
posits of garbage and refuse produce unhealthful con
ditions interfering with and frequently preventing
the comfort and enjoyable use of the beaches and sea
it being dangerous to leave children unattended on
the beach while deposits are there because of things
they may pick up, some of the same being unmen
tionable; that broken glass and nails in pieces of
wood have been the cause of severe wounds to per
sons on the beach or in bathing, and that it is a
menace to health and tends to injure business and
property values and rental values.

17. To so much of the Finding of Fact (7) (Re
port of Special Master, p. 16) as finds that during
June, July and August, 1929, there were in Asbury
Park, a considerable increase over the preceding year
of cases of external otitis which is a swelling or in
flamation of the ear canal, and of cases of infection
of the middle ear requiring the drum to be opened
and of sinus affected cases resulting from bathing

in the ocean, and that one or more of the coast guard incurred a skin infection from the water which gave them considerable trouble.

As far as these exceptions relate to things affecting the health of persons using the beaches or waters of plaintiff, the findings of the Master are of unsubstantial matters. *One doctor* at Asbury Park found an increase of ear infections, 4 in 1928, 12 in 1929, and of another type, 1 in 1928, 12 in 1929; of sinus trouble, 8 in 1928, 11 in 1929 (Pr. A. 84-85), while a few life guards had a skin infection in one year. This evidence is of trifling character. The health physician of Spring Lake found no such conditions (Pr. A. 249).

54. To so much of the Finding of Fact set forth under the heading "Some Issues of Fact" (Report of Special Master, p. 36) as finds or purports to find that whatever garbage and refuse reaches the plaintiff's shores from coastwise and other vessels and other causes and other dumpings than those of the defendant are negligible in comparison with that constantly being dumped by the defendant and frequently carried by winds and waves from the dumping places to and upon plaintiff's shores as hereinbefore stated.

Reasons for this exception are found under Point IV of the brief.

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IN THE

Supreme Court of the United States

No. 12 ORIGINAL—OCTOBER TERM, 1933.

STATE OF NEW JERSEY,
Plaintiff,

vs.

THE CITY OF NEW YORK,
Defendant.

BRIEF FOR THE DEFENDANT FOLLOWING REPORT OF THE SPECIAL MASTER ON SECOND RE-REFERENCE.

The Order of this Court dated May 29, 1933 (289 U. S. 712), directs that the hearing on the respective applications of the complainant and the defendant—the former praying that the defendant be adjudged in contempt for non-compliance with the decree of December 7, 1931; the latter praying for an extension of the time limited in said decree for sea-dumping from June 1, 1933 to April 1, 1934—shall be set down for November 6, 1933, and then further provides for the appointment of a Special Master to take the evidence that may be offered by the respective parties, and such as he may deem necessary, to show:

(1) What shall have been done by the defendant up to September 15, 1933, and the time reasonably required to enable it to comply with the decree; and

(2) The amounts that shall have been expended, subsequent to June 1, 1933, by New Jersey and its political subdivisions to prevent or lessen the defilement or pollution of its waters, shores and beaches and the damages respectively sustained by them as the result of defendant's failure to comply with the decree of December 7, 1931.

The aforementioned decree of December 7, 1931, or that part of it for which complainant prays that the defendant be adjudged in contempt, ordered that

> "On and after June 1, 1933, the defendant * * * and all persons assuming to act under its authority, be and they are hereby enjoined from dumping, or procuring or suffering to be dumped, any garbage or refuse, or other noxious, offensive or injurious matter, into the ocean or waters of the United States, off the coast of New Jersey, and from otherwise defiling or polluting said waters and the shores or beaches thereof * * *."

The cessation on and after June 1, 1933, of the dumping at sea of "any garbage or refuse" is the command of the Court. It will be noted at the outset that the decree contains no provision whatsoever directing the defendant to construct any prescribed number of incinerators. The cessation by defendant of the sea-dumping of garbage or refuse on June 1, 1933, would have given the complainant the maximum measure of relief which it sought in this action, and would have also constituted a full compliance by the defendant with the requirement of the decree in this

regard. (See comment of Special Master in this connection at page 160 of Minutes.)

The record on this second re-reference, dealing with that part of the order of reference dated May 29, 1933, which relates to

> "(1) What shall have been done by defendant up to September 15, 1933,"

goes back to February 13, 1931 (Minutes, page 9), when the mechanical engineer of the Sanitary Commission (now known as the Department of Sanitation) was directed to draft contract plans and specifications for four (4) destructor plants.

To this end there followed the request (March 24, 1931, Minutes, page 14) for and the grant of authority to the Sanitary Commission (May 19, 1931, Minutes, page 15) to engage the necessary engineers, draftsmen, equipment and supplies for the planning, designing and construction of four incinerators.

On May 27, 1931, the Sanitary Commission initiated the necessary steps to have the structures on the three incinerator sites then owned by the City cleared of the structures existing thereon at the time of the acquisition of such sites by the City; the site for the fourth incinerator being in process of acquisition by condemnation.

On September 1, 1931, the proposed contract plans and specifications for these incinerators were approved by the Sanitary Commission (Minutes, page 16), and on September 22, 1931, such contract plans and specifications were transmitted in triplicate to the Board of Estimate and Apportionment for approval of terms and conditions and authorization of funds (Minutes, pages 20-23), and on Sep-

tember 25, 1931, the matter of such approval was referred to the Committee of the Whole of the Board of Estimate and Apportionment of the City of New York. These proposed contracts specified the date for completion in each case as March 31, 1933 (Minutes, page 65).

Revised plans and specifications were submitted to the Board of Estimate and Apportionment by the Department of Sanitation on November 14, 1931, to meet criticism and suggestions made by the engineering staff of the Board of Estimate and Apportionment.

A necessary change in the Use District Map, Section 3, to be made by the Board of Estimate and Apportionment, was initiated by the Department of Sanitation (Minutes, page 46) so as to alter from a "Business" to an "Unrestricted" district part of the incinerator site located at West 215th and West 216th Streets not included within an "Unrestricted" district and this necessary change in the Use District Map was effected January 15, 1932 (Minutes, page 63).

By January 15, 1932, practically all the other necessary preliminary procedure required to be observed by Charter prescription in respect of all contracts before advertising for bids, such for instance, as the approval as to form, by the Corporation Counsel, of the proposed contract forms and specifications and the advertisement for and solicitation of competitive bids (G. N. Y. Charter, §419) thereon (Minutes, pages 61 and 62), had now been carried out. Authority to proceed with the solicitation of bids on the four incinerator contracts was all that remained to be had.

The record at pages 63 to 67 presents a very significant correspondence.

The financial crisis in the City's affairs commences to appear for the first time in connection with the four incinerator contracts. The Mayor requests the Chairman of the Sanitary Commission to submit a statement of how the funds necessary for these contracts would be required (Minutes, page 63). The letter from the Chairman of the Sanitary Commission dated January 19, 1932, in response to this request is set forth in *full* at pages 64 to 67 of the Minutes. In brief, the sum of $350,000 per month for ten months, plus $50,000 for personal service charges will be absolutely required under the proposed four contracts.

On June 17, 1932, the Board of Estimate and Apportionment approved the contracts and specifications for three (3) incinerators for advertisement on three different bases of performance—200 working days, 250 working days, and 300 working days, instead of completion by a specified date, such as March 31, 1933, as originally proposed (Minutes, page 91).

Advertisement for bids commenced July 13, 1932 (Minutes, page 96).

By August 10, 1932, 188 bids on the various alternate proposals and bases of performance were received from 8 bidders.

The analysis of these bids and the examination of the bidders as to their financial responsibility to execute the contracts for which they thus bid then proceeded during the summer of 1932.

On November 18, 1932, the Board of Estimate and Apportionment authorized the award of contracts for two incinerators (Minutes, page 123). The Contracts were executed by the successful bidder (Minutes, page 128) on November 23, 1932.

These contracts, in order to be a binding obligation on the City must, under Section 149 of the Charter, be "registered" by the Comptroller of the City of New York.

The requirement of "registration" of contracts awarded at public letting is set forth in said section as follows:

> "No contract hereafter made the expense of the execution of which is not * * * to be paid by assessment upon the property benefited, shall be binding or of any force, unless the Comptroller shall indorse thereon his certificate that there remains * * * a balance of the appropriation or fund applicable thereto, sufficient to pay the estimated expense of executing such contract as certified by the officer making the same * * *. It shall be the duty of the comptroller to make such indorsement * * * if there remains unapplied and unexpended such amount so specified by the officer making the contract and to thereafter hold such sum to pay the expense incurred until said contract shall be fully performed. And such indorsement shall be sufficient evidence of such appropriation or fund in any action * * *."

They were so registered by the Comptroller, after qualification of the respective sureties, on December 23, 1932 (Minutes, page 130).

Construction of the incinerators was commenced on March 21, 1933.

The contracts so awarded were for the construction of one incinerator at 215th and 216th Streets, 9th and 10th Avenues, Borough of Manhattan, for the sum of $696,395 and a second incinerator at Zerega Avenue, Lafayette Avenue and Hermany Avenue, The Bronx, at a contract price of $713,140, or an aggregate cost of $1,409,535. The contracts called for completion of the incinerators (exclusive

of heating and plumbing for which items, under the law of the State of New York, separate contracts must be awarded) in 200 consecutive working days. Each incinerator has a rated daily capacity for the destruction of 750 tons of garbage.

On October 2, 1933, the first incinerator (Manhattan) was 34% complete and the second incinerator (The Bronx) was 20% complete. (Testimony of Contractor, at page 610; of Commissioner Goodrich, page 559 of Minutes).

I.

The inability of the defendant to sell its corporate securities in the bond market has prevented the defendant from constructing the necessary incinerator facilities to enable defendant to discontinue disposal of garbage at sea by June 1, 1933, as required by the decree of this Court.

Municipal improvements, such as garbage incinerators, are and must be, financed through or by the issuance and sale of long-term corporate stock of the defendant.

Section 169 of the Greater New York Charter as amended [Chapter 466, Laws of 1901] provides for the issuance of such corporate stock for various specified municipal purposes.

This section expresaly prohibits the City from expending any part of the proceeds of the sale of corporate stock or serial bonds for the purpose of

> "paying operating expenses of said city as hereinafter defined."

And the term "operating expenses" is then defined by said section in the following language:

> "The term 'operating expenses,' as used in this section, includes expenses for maintenance, repairs and current operation or administration of the property and government of the city; and excludes expenditures by the city for betterments, improvements and acquisitions of property of a permanent nature; but expenditures made or incurred by the board of water supply, the aqueduct board, and prior to January first, nineteen hundred and ten, by the department of docks, shall not be considered operating expenses within the meaning of this act."

Continuing, this section provides for the issuance of corporate stock for various specific capital purposes, such as hospitals and additions thereto, school buildings and sites therefor, and equipment for such new school buildings, the erection and equipment of buildings for the American Museum of Natural History and the Museum of Art which by Charter and contract with the City is an adjunct of the educational system of the City, and

> "for the erection and equipment when first erected of buildings *for garbage and rubbish disposal plants and dumps.*"

In brief, the financial scheme erected by the Legislature of the State of New York through the Charter of the fendant City, provides (1) for the financing of *capital or permanent improvements* by the issuance of its corporate stock or serial bonds; and (2) *"operating expenses"* which embraces charges for maintenance and administration "of the property and government of the city" by means of the annual tax levies.

The building of permanent public improvements, such as garbage incinerators out of budgetary appropriations, has never been done. "It is contrary to all the charter provisions that I know of" (McInnes, Minutes, pages 227-228).

March 1, 1931, was the date of the last sale of long-term corporate stock bonds which the City was, or has been, able to have (Minutes, page 219). This situation antedated the original decree of this Court in this action.

The issuance of special corporate stock notes (to be redeemed by long-term corporate stock) was restricted in January, 1932, by Chapter 4, New York Laws of 1932 (in effect January 22, 1932), to the sum of $200,000,000 and this limitation included previous corporate certificate or note issues of $76,700,000. The restriction, imposed upon the City by the State Legislature in January of 1932 (Chapter 4, Laws of 1932), against the issuance of corporate stock notes was a new regulation. Prior to that there had been no such restriction on the amount of corporate stock notes it might issue (McInnes, page 220).

Of the said $200,000,000 special corporate notes, $5,915,000 remain still to be sold. The bankers will not loan the City any more money (McInnes, Minutes, page 222).

There is still some money on hand left to pay maturing payments on account of the two incinerators under contract (McInnes, page 223).

At this point, it may not be amiss to clarify, again, some confusion which has arisen over the significance of what are termed "*authorizations.*"

The financial witness for the City does this at pages 218-219 of the record in the following language:

> "Q. In other words, an improvement having been authorized by the Board of Estimate, and the Board

> of Estimate having authorized the amount of money for it, that does not mean that the money is available at that time? A. No, it does not. The money is only available when the Comptroller is able to sell corporate stock notes, or to have a long term bond sale."

In other words, an "authorization" is a direction to *contract* or to *incur* municipal liability for a given project. Corporate stock is not sold until a payment on account of the project so authorized has matured or is about to mature. Sales occur when the need of the money to be obtained therefrom is imminent. This procedure is followed because it reduces or defers the accruing of interest on the corporate stock so sold until the actual utilization or application of the moneys to municipal liabilities which are to be defrayed therefrom.

While the City was unable to hold a long-term corporate stock sale after March 1, 1931, the financial crisis did not become acute until January, 1932, when limitation at the insistence of the bankers was placed upon the issuance of corporate stock certificates (Chap. 4, Laws of 1932 in effect January 22, 1932); and as hereinbefore pointed out [*ante*, page 9] the proceedings leading up to the award of the incinerator contracts had proceeded without any prejudicial delay until January 15, 1932, when the Mayor called for a statement of the amounts of money needed in 1932 for the carrying out of the four incinerator contracts then pending approval before the Board of Estimate and Apportionment (See Minutes, pages 63 *et seq.*).

The only cure for the situation confronting the defendant since March 1, 1931, and becoming more increasingly acute with the lapse of time since then, is an improvement in bond market conditions. The bankers have been unable

to float long-term loans for the City, so as to take up some, at least, of the outstanding corporate stock (short-term) certificates (McAneny, page 580).

Not a theory, but a condition—a dire condition—has confronted and still confronts the City in this matter.

That the City has also been seriously embarrassed by the non-payment of taxes by property owners for several years passed is evidenced by the fact testified to by the witness McInnes, at pages 223 and 224, showing the increasing sums necessary to be included in the annual budget to cover the item of uncollectible taxes—$4,750,000 in 1931 and $5,750,000 in 1932.

The insinuations of the complainant that the financial difficulty confronting the defendant in regard to incinerator construction is due to waste, extravagance or maladministration by the defendant's officers, is as unfounded as it is most ungracious. The Special Master did not conclude that either Mr. McInnes or Comptroller McAneny misrepresented the situation confronting the City since early in the year 1931, and there is no reason to believe that this Court would accept the complainant's insinuation.

II.

The complainant did not, upon the re-reference, furnish any legal proof of damage.

An extended examination and discussion of the evidence adduced on this phase of the inquiry will not be attempted.

It will be noted at the outset that the complainant itself sustained no damage. Of the twenty-nine municipalities involved in this proceeding, only nine made any claim of alleged damage. The aggregate amount of these claims is

determined by the Special Master to be the sum of $2,160.79. The astute Attorney General of New Jersey marvelled before the Master at "the extreme moderation" of these claims.

The so-called "extreme moderation" of these alleged claims of damage on the part of municipalities whose territory fronts upon the Atlantic shore of the State of New Jersey should not be suffered to obscure or conceal the inherent weakness of complainant's proof.

Legal damage may not be predicated on conjecture.

Complainant did not meet the requirements of the decree on this second reference merely by showing that it, or its political subdivisions, incurred expense in cleaning the respective beaches of materials cast thereon by the ocean. Complainant must prove, first, that the materials cleaned from the respective beaches of the several political subdivisions came from the scows dumped at sea by the defendant, and, secondly, the reasonable cost of the removal of such materials. It did not sustain this burden. Indeed, many of the complainant's municipalities which had claimed to be damaged by the defendant prior to the year 1933, sustained no damage whatsoever during the Summer of 1933.

The situation has materially changed since the decree originally entered in this suit. Prior to July 19, 1933, the summer dumping ground at which the defendant disposed of its garbage was located approximately twenty-five nautical miles off the nearest point of the Jersey coast. Since July 19, 1933, the defendant has been dumping its garbage at a point 35.8 nautical miles distant from the nearest point of the Jersey coast. It is significant in this connection, to point out that almost all of the witnesses who testified on the second re-reference, stated in substance that practically

no garbage had come on their beaches since the early part of the summer.

An examination of complainant's exhibit 501 (photographs of the various beaches) shows materials other than garbage, such as planks, timber, bottles and cans, to comprise the predominant bulk of such materials. That these materials, which strictly speaking constitute rubbish and not garbage, came from the scows dumped at sea by the defendant, the record is utterly barren of any proof.

Rubbish—namely, paper, cartons, crates and all varieties of things that do not constitute garbage—is and has always been separately collected from garbage and ashes. Rubbish so-called, is what is known for the purpose of incineration, as burnable material.

The successful operation of the incinerating plants requires the defendant City to be, as it has been, most alert in securing all of these burnable materials that it can, for fuel purposes in the destruction of garbage in its existing incinerators.

That the wood shown in plaintiff's exhibit 501, being mostly long boards and planks, could not come from the scows dumped at sea by the defendant is, we think, conclusively established by the testimony of the witnesses Goodrich, Green and Scocasa.

Concerning the item of bottles and glass shown in plaintiff's exhibit 501, defendant shows, in rebuttal, that for years past it has been able to award at public letting, a reclamation contract or privilege from which it derives a revenue of $756 a week, under which contract the contractor has the right to pick all salvagable materials from the sea-going scows; the testimony of the witness Scocasa shows that he employs a force of from fifteen to twenty men at

each waterfront dump for the purpose of picking from the garbage such salvagable materials; that among the materials so picked from the sea-going scows are all kinds of bottles and glass, including electric light bulbs and radio tubes. That the quantity of bottles and glass picked up at each one of the thirteen waterfront dumps averages from 50 to 60 barrels a week, and that the number of bottles contained in these barrels varies from 80 to 100 bottles, according to the size of the barrel.

As the result of an investigation undertaken by the defendant's Sanitation Department to determine whether or not it would be more profitable to the City to undertake the work of reclamation instead of awarding a contract at public letting for that privilege, the records of that Department show that the number of bottles reclaimed from the sea-going scows in the month of June, 1933, were 210,033; for the month of July, 227,620; for the month of August, 255,992, and for the first seven days of September, 129,735.

Concerning the item of cans, it is respectfully suggested that the claim of the plaintiff that open or uncovered cans shown in Complainant's Exhibit No. 501 could float from the scows of the defendant, a distance of 35.8 nautical miles, challenges credulity.

The presumption that all these materials shown in plaintiff's exhibit 501, must come, or could only come, from the scows dumped at sea by the defendant, cannot be indulged. The record in this action precludes such a presumption. The record shows that cargoes of condemned foodstuffs, such as onions, are dumped at sea. The record on this reference shows that in the months of June, July and August down to September 15th (Minutes, page 588) 4,459 vessels passed the Jersey coast within sighting dis-

tance, as shown by the records of the Coast Guard Station at Monmouth Beach, and that roughly half of this number were passenger vessels or ocean vessels (Minutes, page 600).

It thus appears that the complainant has failed to prove any legal damage against the defendant.

III.

The time reasonably required to enable the defendant to comply with the decree of this Court entered December 7, 1931, should be extended to July 1, 1934.

At the present time the only materials going to sea come from the Boroughs of Manhattan and The Bronx. Upon the completion and operation of the two incinerators now under construction—one located in the Borough of Manhattan, and the other located in the Borough of The Bronx, it will be possible for the defendant to dispose by incineration of all garbage except 250 tons per day.

The time when these two incinerators will be ready for operation is in dispute. The dates for their final completion and readiness for use as fixed by Sanitation Commissioner Goodrich is as follows:

(a) 215th Street (Manhattan Incinerator)—April 21, 1934,

(b) Zerega Avenue (Bronx Incinerator)—June 30, 1934.

The Contractor claims much earlier dates of completion as follows:

(a) 215th Street (Manhattan)—December 31, 1933,

(b) Zerega Avenue (Bronx) —February 5, 1934.

The dates of completion as testified to by the Contractor are not absolute, because the Contractor testified that these dates were subject to contingencies,

(1) Weather conditions when no work can be performed for which he made no allowance in his calculations of time of completion, and

(2) Limitation by way of reduction of the number of working hours per day resulting from the adoption of the proposed N. R. A. Construction Code now pending before the Federal authorities.

It is believed, in view of the present stage of construction of these two incinerators, Manhattan incinerator being thirty-four per cent (34%) completed and the Bronx incinerator twenty per cent (20%) completed, which is conceded to be correct by the complainant's witness, the Contractor, that the prospective dates of completion of these incinerators as testified to by Commissioner Goodrich will prove decidedly more dependable than the dates testified to by the Contractor.

The reason for this is obvious. Under the provisions of the contracts for the construction of these incinerators, the Contractor is subject to the payment of liquidated damages of $1,000 per day for any delay chargeable to him under each contract, and it is too much to expect of human nature that he would concede at this time, by his testimony in this proceeding, that he is liable to such penalties for a great number of days under each contract.

Upon the completion of the first incinerator in the month of April, 1934, the amount of garbage that the defendant will still be required to dispose of at sea will be reduced almost one-half, and with the disposition of this

reduced quantity of garbage at the thirty-five mile ground, the complainant will have no cause for grievance in view of the testimony of its witnesses on this second re-reference.

Upon the completion of the second incinerator, on or about June 30, 1934, the defendant will be able to discontinue the dumping of garbage at sea entirely by taking care of the small balance otherwise than by sea-dumping.

The findings of fact and conclusions of law which the defendant City believes are sustained by the evidence are appended hereto.

Respectfully submitted,

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Corporation Counsel,
Solicitor for the Defendant,
The City of New York.

THOMAS W. A. CROWE,
J. JOSEPH LILLY,
Of Counsel.

Defendant's Proposed Findings and Conclusions.

1. Considering statutory requirements defendant proceeded with due diligence in the performance of all preliminary work to enable it to comply with the decree, and in January, 1932, was progressing at a rate which would have enabled it to comply on or before June 1, 1933, the date fixed by the Court.

2. The delay commencing January 15, 1932, has been due entirely to unforeseen, unpredictable and insolvable problems, arising solely from the inability of defendant, City, to sell its corporate stock securities wherewith to secure moneys necessary to defray the expenses for the construction of incinerators.

3. Because the defendant has proceeded with due diligence, under all the circumstances, until prevented from making further progress by causes and conditions entirely beyond its control, the defendant has not been and is not in wilful contempt of this Court.

4. A reasonable time to permit the defendant, under all the circumstances, and particularly those arising since the entry of the decree in this case, to provide adequate facilities to permit it entirely to discontinue dumping at sea would be not earlier than June 30, 1934.

5. The complainant has failed to prove any legal damage properly chargeable against the defendant City.